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By A. C. FREEMAN.

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OREGON. — (15) **3**; (16) **8**; (17) **11**; (18) **17**; (19) **20**; (20) **23**; (21) **28**; (22) **29**; (23) **37**; (24) **41**; (25) **42**; (26) **46**; (27) **50**; (28) **52**; (29) **54**; (30) **60**; (31) **65**; (32) **67**; (33) **72**; (34) **75**; (35) **76**; (36) **78**; (37) **82**; (38) **84**; (39) **87**.

PENNSYLVANIA. — (115, 116, 117 **Pa. St.**) **2**; (118, 119 **Pa. St.**) **4**; (120, 121 **Pa. St.**) **6**; (122 **Pa. St.**) **9**; (123, 124 **Pa. St.**) **10**; (125 **Pa. St.**) **11**; (126 **Pa. St.**) **12**; (127 **Pa. St.**) **14**; (128, 129 **Pa. St.**) **15**; (130, 131 **Pa. St.**) **17**; (132, 133, 134 **Pa. St.**) **19**; (135, 136 **Pa. St.**) **20**; (137, 138 **Pa. St.**) **21**; (139, 140, 141 **Pa. St.**) **23**; (142, 143 **Pa. St.**) **24**; (144, 145 **Pa. St.**) **27**; (146 **Pa. St.**) **28**; (147, 150 **Pa. St.**) **30**; (151 **Pa. St.**) **31**; (148 **Pa. St.**) **33**; (149, 152, 153 **Pa. St.**) **34**; (154, 155 **Pa. St.**) **35**; (156 **Pa. St.**) **36**; (157 **Pa. St.**) **37**; (158 **Pa. St.**) **38**; (159 **Pa. St.**) **39**; (160 **Pa. St.**) **40**; (161 **Pa. St.**) **41**; (162 **Pa. St.**) **42**; (163 **Pa. St.**) **43**; (164, 165 **Pa. St.**) **44**; (166 **Pa. St.**) **45**; (167 **Pa. St.**) **46**; (168, 169 **Pa. St.**) **47**; (170, 171 **Pa. St.**) **50**; (172, 173 **Pa. St.**) **51**; (174, 175 **Pa. St.**) **52**; (176 **Pa. St.**) **53**; (177 **Pa. St.**) **55**; (178 **Pa. St.**) **56**; (179, 180 **Pa. St.**) **57**; (181 **Pa. St.**) **59**; (182 **Pa. St.**) **61**; (183, 184 **Pa. St.**) **63**; (185 **Pa. St.**) **64**; (186 **Pa. St.**) **65**; (187 **Pa. St.**) **67**; (188 **Pa. St.**) **68**; (189 **Pa. St.**) **69**; (190 **Pa. St.**) **70**; (191 **Pa. St.**) **71**; (192 **Pa. St.**) **73**; (193 **Pa. St.**) **74**; (194 **Pa. St.**) **75**; (195 **Pa. St.**) **78**; (196 **Pa. St.**) **79**; (197 **Pa. St.**) **80**; (198 **Pa. St.**) **82**; (199 **Pa. St.**) **85**; (195, 200 **Pa. St.**) **86**; (201 **Pa. St.**) **88**; (202 **Pa. St.**) **90**.

- RHODE ISLAND.** — (15) 2; (16) 27; (17) 33; (18) 49; (19) 61; (20) 78; (21) 79; (22) 84.
- SOUTH CAROLINA.** — (26) 4; (27, 28, 29) 13; (30) 14; (31, 32) 17; (33) 26; (34) 27; (35) 28; (36) 31; (37) 34; (38) 37; (39) 39; (40) 42; (41) 44; (42) 46; (43) 49; (44) 51; (45) 55; (46) 57; (47) 58; (48) 59; (49) 61; (50) 62; (51) 64; (52) 68; (53) 69; (54) 71; (55) 74; (56, 57) 76; (58) 79; (59) 82; (60, 61) 85; (62) 89; (63) 90.
- SOUTH DAKOTA.** — (1) 36; (2) 39; (3) 44; (4) 46; (5) 49; (6) 55; (7) 58; (8) 59; (9) 62; (10) 66; (11) 74; (12) 76; (13) 79; (14) 86.
- TENNESSEE.** — (85) 4; (86) 6; (87) 10; (88) 17; (89) 24; (90) 25; (91) 30; (92) 36; (93) 42; (94) 45; (95) 49; (96) 54; (97) 56; (98) 60; (99) 63; (100) 66; (101) 70; (102) 73; (103) 76; (104) 78; (105) 80; (106) 82; (107) 89.
- TEXAS.** — (68) 2; (69; 24 Tex. App.) 5; (70; 25, 26 Tex. App.) 8; (71) 10; (27 Tex. App.) 11; (72) 13; (73, 74) 15; (75) 16; (76) 18; (77; 28 Tex. App.) 19; (78) 22; (79) 23; (29 Tex. App.) 25; (80, 81) 26; (82) 27; (30 Tex. App.) 28; (83) 29; (84) 31; (85) 34; (31 Tex. Cr. Rep.; 86) 37; (86; 32 Tex. Cr. Rep.) 40; (87; 33 Tex. Cr. Rep.) 47; (34 Tex. Cr. Rep.; 88) 53; (89, 90) 59; (35 Tex. Cr. Rep.) 60; (36 Tex. Cr. Rep.) 61; (91; 37 Tex. Cr. Rep.) 66; (38 Tex. Cr. Rep.) 70; (92) 71; (39 Tex. Cr. Rep.) 73; (40 Tex. Cr. Rep.) 76; (93) 77; (94) 86.
- UTAH.** — (13) 57; (14) 60; (15) 62; (16) 67; (17) 70; (18) 72; (19) 75; (20) 77; (21) 81; (22) 83; (23) 90.
- VERMONT.** — (60) 6; (61) 15; (62) 22; (63) 25; (64) 33; (65) 36; (66) 44; (67) 48; (68) 54; (69) 60; (70) 67; (71) 76; (72) 82; (73) 87.
- VIRGINIA.** — (82) 3; (83) 5; (84) 10; (85) 17; (86) 19; (87) 24; (88) 29; (89) 37; (90) 44; (91) 50; (92) 53; (93) 57; (94, 95) 64; (96) 70; (97) 75; (98) 81; (99) 86.
- WASHINGTON.** — (1) 22; (2) 26; (3) 28; (4) 31; (5) 34; (6) 36; (7) 38; (8) 40; (9) 43; (10) 45; (11) 48; (12) 50; (13) 52; (14) 53; (15) 55; (16) 58; (17) 61; (18) 63; (19) 67; (20) 72; (21) 75; (22) 79; (23) 83; (24) 85; (25) 87; (26) 90.
- WEST VIRGINIA.** — (29) 6; (30) 8; (31) 13; (32, 33) 25; (34) 26; (35) 29; (36) 32; (37) 38; (38, 39) 45; (40) 52; (41) 56; (42) 57; (43) 64; (44) 67; (45) 72; (46) 76; (47) 81; (48) 86; (49) 87; (50) 88; (51) 90.
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VOLUME 90.

(35)

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

STATE ex rel. CRAFT v. WILLIAMS.

[131 Ala. 56, 30 South. 782.]

REVIVOR.—One who has Acquired the Title to Lands of the Heirs of an Intestate by purchase under a decree of sale of the probate court for partition may, in proceedings to revive an order of sale of such property, interpose any defense available to the heirs. (p. 19.)

DESCENT AND DISTRIBUTION.—On the Death of an Intestate, His Lands Descend Directly to the Heir, subject to the right of the personal representative to subject them to the payment of debts. (p. 19.)

EXECUTORS AND ADMINISTRATORS—Sale of Land.—The Insufficiency of Personal Property to Pay the Debts of an intestate is a condition precedent to the exercise by an administrator of a power to sell the land for such purpose. (p. 19.)

EXECUTORS AND ADMINISTRATORS.—As Against the Heir, the Lands of an Intestate cannot be sold by an administrator to pay debts, unless there exist at the time of the sale valid subsisting demands against the intestate, and an insufficiency of personal property to satisfy them. (p. 19.)

RES JUDICATA.—A Decree of Sale of a Probate Court of an Intestate's Lands for the payment of debts, upon the petition of an administrator, is not res judicata as to the validity of the debts and the insufficiency of personal property to pay them as against the heir or his successor in interest, who may contest a motion to revive such order of sale upon the ground that the debts are barred by the statute of limitations. (p. 20.)

ESTOPPELS, to be Binding, Must be Mutual. (p. 20.)

Petition for mandamus against a probate judge to compel the probate court to strike out the application of heirs of an intestate for a sale of the property for division among them, and also to require the court to revive an order of sale of the intestate's lands made seven years before for the payment of

debts. Prior to this proceeding the heirs had filed a petition to have the lands sold for partition, and a sale resulted. The first administrator of the estate of Stoutz, appointed in 1888, filed a petition for an order of sale of real estate and a decree authorizing a sale was made in 1892. The sale was not made, the administrator died, and the new administrator, the present petitioner in 1899, filed a motion to revive the former order of sale in his name. The purchaser at the partition sale was let in to defend against this motion, on the ground that the debts were barred by the statute of limitations, and that there was no present reason or necessity for the sale. The application for mandamus was denied.

D. B. Cobbs and R. T. Ervin, for the appellant.

Gregory L. & H. T. Smith and Phares Coleman, contra.

59 TYSON, J. Confessedly, at the date the revivor was attempted, the debts, for the payment of which the lands are sought to be subjected, were barred by the statute of limitations, more than six years and six months having elapsed between their maturity and the making of the motion for the order of revivor, unless the order of sale granted on the petition of the administrator in chief, sought to be revived and enforced by this appellant, precludes the heirs of those succeeding to their title or interest in the lands from invoking the defense. The vital question presented for our consideration is, whether the decree of sale is *res adjudicata* as to the validity of the debts, and the insufficiency of personal property of the estate to pay them as against the heir or his successor in interest. Before disposing of this question, it will not be amiss to say, notwithstanding it seems to be conceded, that the defendants in the **60** revivor proceeding, who acquired the title of the heirs of appellant's intestate by purchase under a decree of sale of the probate court of the lands for partition, can interpose any defense which would be available to the heirs. In other words, they take the place of the heirs, having the title to the land sought to be subjected: *Spears v. Banks*, 114 Ala. 323, 21 South. 834.

On the death of an intestate, his lands descend directly to the heir, subject to the right of the personal representative to subject them to payment of debts, which are valid, subsisting, legal demands against the intestate, if he was living. The existence of an insufficiency of personal property to pay the

debts, however, is a condition precedent to the exercise of this power. So, then, as against the heir or his successor in interest, the land cannot be sold by an administrator to pay debts, unless there exists at the time of the sale, valid, legal, subsisting demands against the intestate and an insufficiency of personal property to satisfy those demands: *Steele v. Steele*, 64 Ala. 438, 38 Am. Rep. 15; *Scott v. Ware*, 64 Ala. 174. This must be the status or condition of the estate at the time the decree of sale is rendered, and this status must continue until the title of the heir is divested by the proper execution of the decree.

Manifestly, if there are no debts, or if the debts which once were enforceable demands have become barred by the statute of limitation, no necessity exists for the exercise of the power reposed in the administrator by the statute to sell the lands of the heir. This proposition does not seem to be controverted by appellant, but it is contended that when the petition for the sale of the lands was heard, the heirs were parties and had the opportunity to interpose all available defenses against the validity of the debts as enforceable demands, and, therefore, they or their successors in interest are now precluded from showing a change in the status of the estate—to wit, that there are no debts for the reason that they are barred by the statute of limitations. The principles declared in *Ford v. Ford*, 68 Ala. 141, are conclusive of this point. It is there said: "When an application to the court of probate, by a personal representative, ⁶¹ for an order to sell lands for the payment of debts, is contested, it assumes the form, and has the characteristics and properties, of a suit inter partes. The judgment or decree rendered by the court is conclusive between the parties, in reference to the subject matter of the suit, and the matters which were in issue and determined. If the judgment or decree is that the order of sale be granted, it is conclusive that, at the time of its rendition, the personal property of the estate is insufficient for the payment of debts. Or, if the judgment or decree is that the application be not granted, it is conclusive that the personal assets are then insufficient for the payment of debts. The judgment or decree has relation solely to the status of the estate in this respect, at the time of its rendition, and not to its status at some subsequent time, when new facts may have occurred changing it. Debts may come to the knowledge of the personal representative, and may be presented and preferred, of which he was uninformed,

and the payment of which may render a sale of the lands necessary. Or, without fault on his part, the personal assets may be lost or diminished in value, rendering a sale of the lands necessary, which was unnecessary while the personal assets were available. The decree of the court of probate, refusing an order for the sale of the lands, and dismissing the application of the personal representative, as between him and the heirs who were parties, is conclusive that the personal property of the intestate was, at the time of its rendition, sufficient for the payment of debts": See, also, *McCalley v. Robinson*, 70 Ala. 432. It is scarcely necessary to add, that if the personal representative is not estopped to show a change in the status of the estate rendering it necessary to sell lands to pay debts, that the heir is not precluded from showing the non-existence of such necessity. Estoppels must be mutual.

Affirmed.

Descent and Distribution.—The title to real estate, upon the death of an ancestor, descends at once to the heir, who is entitled to the possession thereof, no right or title therein going to the executor or administrator: See *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239, 65 Pac. 215; monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 175, 179.

The Debts of a Decedent are to be Paid from his personal estate, unless that is exhausted, whereupon the realty may be applied to that purpose, under an order of court: *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540; *Estate of Freud*, 131 Cal. 667, 82 Am. St. Rep. 407, 63 Pac. 1080. See, also, *Carr v. Hull*, 65 Ohio St. 394, 87 Am. St. Rep. 623, 62 N. E. 439. But in any proceeding to subject the lands of an heir or devisee to the payment of a claim against the ancestor, they may contest its legality, regardless of whether it has been duly allowed by the probate court as a claim against the estate: *Black v. Elliott*, 63 Kan. 211, 88 Am. St. Rep. 239, 65 Pac. 215.

EX PARTE MASSIE.

[131 Ala. 62, 31 South. 483.]

TIME.—Fractions of a Day are not Usually Regarded, in judicial proceedings, but such proceedings take effect in law from the earliest period of the day upon which they originated and came into force. (p. 20.)

TIME.—The Unity of a Day and its Indivisibility as a period of time is a fiction of the law, and is regarded only in promotion of the ends of justice, and never when justice and right will thereby be defeated. (p. 20.)

JUDGMENT AFTER DEATH.—A decree rendered on the same day as, but after, the death of a material defendant in a cause, is void, and may be set aside on motion. (p. 21.)

P. J. Hamilton, for the petitioner.

C. J. Torrey, contra.

⁶³ DOWDELL, J. The petitioner prays for rule nisi to be directed to the chancellor to show cause why a peremptory mandamus should not issue commanding him to vacate a certain order made by him on November 1, 1901, in the case of Jessie H. Massie v. L. J. Cullen et al., pending in the chancery court of Mobile county, in which a final decree rendered in said cause on October 29, 1901, was set aside. The petition shows that on October 24, 1901, the said cause was argued and regularly submitted for final decree on the pleadings and evidence. On October 29, 1901, the chancellor rendered a final decree, which was on that day regularly filed. ⁶⁴ On October 31, two days later, a motion was made to set aside said decree upon the ground that Emma P. Cullen, one of the respondents in the bill, had died before the rendition and filing of said decree. It was shown that the said respondent, Emma P. Cullen, died about 6 o'clock on the morning of the day of said decree.

It is contended by petitioner that the doctrine laid down by this court in *Powe v. McLeod*, 76 Ala. 418, is wrong in principle and should be overruled, and it is further insisted that there should be no distinction in the rule as applied to judgments of the supreme court in such cases and to decrees of the chancery court. We cannot agree to this contention, and we adhere to the doctrine as laid down in *Powe v. McLeod*, 76 Ala. 418. It is a general rule that in judicial proceedings fractions of a day are not regarded, but such proceedings take effect in law from earliest period of the day upon which they originated and came into force, but this general rule is not absolute, and where from the nature of the case justice requires it, fractions of a day are reckoned: 8 Am. & Eng. Ency. of Law, 2d ed., 739-742. The unity of a day and its indivisibility as a period or point of time is a fiction of the law, and is regarded only in promotion of the ends of justice, and never when justice and right will thereby be defeated. This fiction of the law had its origin in the common law, and while the courts of England have generally adhered to it, still in those courts the rule has not been universal in its observance. The courts of this country, however, have been disposed to depart from the rule, and fractions of a day are reckoned where justice requires it. Many cases will be

found cited in the notes on this subject in 8 American and English Encyclopedia of Law, second edition, on pages 738-743, and we content ourselves with reference to these notes without going into any prolonged discussion of the subject. In Patterson's Appeal, 96 Pa. St. 93, it was held that where judgment is entered on the same day, but after the death of defendant debtor, the legal fiction of relation of judgments does not apply, and it is not entitled ⁶⁵ to priority of payment out of the proceeds of the sale of real estate over the claims of general creditors. The doctrine asserted in this case is directly in point and applicable to the case at bar. Our conclusion is that the decree in the present case, having been rendered after the death of Emma P. Cullen, who was a material defendant in the cause, was void, and the chancellor committed no error in setting aside the decree on motion. The petition for mandamus will be denied.

Fractions of a Day are usually not considered in the computation of time, though they may be if justice demands it. Thus, when it is necessary to ascertain the exact time of a death, fractions of a day may be computed: See the monographic note to *State v. Michel*, 78 Am. St. Rep. 382, 383.

Judgments Rendered After the Death of the defendant are considered in the monographic note to *Watt v. Brookover*, 29 Am. St. Rep. 816-819. Consult, also, *Shea v. Shea*, 154 Mo. 599, 77 Am. St. Rep. 779, 55 S. W. 869; *Reynolds v. Nesbitt*, 196 Pa. St. 636, 79 Am. St. Rep. 736, 46 Atl. 841.

GULF RED CEDAR LUMBER COMPANY v. O'NEAL.

[131 Ala. 117, 30 South. 466.]

ALTERATION OF INSTRUMENTS.—Whenever a Deed has Been Fully Executed and Delivered, it passes the title to the grantee therein, which cannot thereafter at law be divested by a mere change in the deed itself, with or without the consent of the grantee. (p. 24.)

DEEDS—Execution and Delivery.—When a grantor, after duly signing and attesting a conveyance, files it in the probate office for record, it constitutes a sufficient delivery, completing the execution and delivery of the instrument. (p. 24.)

WHEN A TRUSTEE IS CLOTHED WITH POWER to Sell Real Estate, a sale by him is valid and conveys the legal title. (p. 25.)

POWERS.—It is not Necessary That an Intention to Execute a Power of Sale should expressly appear upon the face of the instrument. (p. 26.)

POWERS.—A Deed Made by the Donee of a Power, although it purports to dispose of only the individual property of the donee, constitutes a good execution of the power, if such is the intent, and it cannot operate in any other way. (p. 28.)

POWERS—Execution of, What is.—Where a grantor in a trust deed reserves the power to control, sell and convey any portion of the property, and who also has an undivided interest therein, a deed of a portion of such property, which makes no reference to the trust deed, but which is obviously intended to pass the entire interest in the property, is a good execution of the power, and does not merely dispose of the undivided interest of the grantor. (p. 29.)

POWER—Sale of Trees.—A Power Reserved in a Trust Deed to sell any portion of the property is properly executed by selling trees and timber without a sale of the land itself. (p. 30.)

TRUSTS—Equity—Parties.—In a Suit to Enforce the Rights of Beneficiaries in a trust deed, the husband of a deceased beneficiary need not be joined individually as a party plaintiff, where he is joined as the administrator of his wife's estate, and also sues as the next friend of her son. (p. 31.)

TRUSTS—Parties.—In a Suit by Beneficiaries and Grantees Under a Trust Deed which reserves a power of sale in the grantor to enforce their rights against subsequent purchasers of the property, the administrator of the deceased grantor is not a necessary defendant. (p. 32.)

Bill in equity for an accounting and an injunction.

C. E. Hamilton and D. M. Powell, for the appellant.

J. M. Chilton, contra.

127 HARALSON, J. 1. The deed of Thomas C. Crenshaw to the complainants, of date 9th of April, 1873, purports to have been received by the judge of probate and recorded on the day of its date, and this fact is so averred in the bill. It contains the provision: "I hereby reserve to myself the right to control and manage the property hereinabove conveyed for the use and benefit of said named children, until the youngest child arrives at the age of twenty-one years."

128 It is averred that on June 1, 1873, without the consent of either of the complainants, the beneficiaries in said deed, the said Thomas C. Crenshaw, erased from said deed the words, "until the youngest child arrives at the age of twenty-one years," and the words, "during my life," were inserted by him in the place thereof, and he wrote at the bottom of his signature, which had been affixed on the 9th of April, 1873, the words and figures: "June 1, 1873. The words 'until the youngest child arrives at the age of twenty-one years,' were erased, and the words, 'during my life,' were inserted before delivery," which written words were signed by him and witnessed by W. H. Crenshaw.

The complainants aver that said deed had in fact been delivered before said change was made, to wit, when the same was recorded, and as they are advised, they allege that said Crenshaw had no power or authority to change said deed, or to divest or in any manner affect the estate which had vested in them by the previous execution and delivery of the same. But they further aver that if they are mistaken in this, then they aver that said deed, as changed as aforesaid, was executed by said Thomas C. Crenshaw, on said first day of June, 1873, and was thereupon, to wit, on said last-mentioned day, delivered by said Thomas C. Crenshaw, to the grantees therein named, in whose custody the same now is.

Whether the said change in the deed by the grantor to his children occurred before or after delivery it is manifest the change affects only the duration of the trust, and not the trust itself. It is well settled in this state, whatever may be the rule elsewhere, that whenever a deed has been fully executed and delivered, it passes the title to the grantee therein, which cannot thereafter at law be divested by a mere change in the deed itself, with or without the consent of the grantee; and that when, after due signature and attestation of a conveyance the grantor files it in the probate office for record, this constitutes a sufficient delivery, completing the execution and delivery of the instrument: *Elston v. Comer*, 108 Ala. 76, 19 South. 324; *Woodstock Iron Co. v. Richardson*, 94 Ala. 631, 10 South. 144; *Sheffield etc. Coal Co. v. Neill*, ¹²⁰ 87 Ala. 158, 6 South. 1; *Walker v. Crews*, 73 Ala. 412; *Frisbie v. McCarty*, 1 Stew. & P. 62.

If the alleged alteration in the deed was made after its delivery, then such alteration did not affect the conveyance, and the trust ceased when the grantor's youngest child became of age. If made before the delivery, then it was properly made, and the trust would continue during the life of the grantor. In either aspect, the deed is good, and in the averments of the bill, as to this matter, is found nothing upon which to predicate an objection to it as raised by demurrer.

2. The second error assigned which is insisted on is, that the court overruled the demurrer to the bill, on grounds 29 and 30, viz., that it plainly appears, that Thomas C. Crenshaw had the power and the right to make the said extension agreement and bind the complainants thereby, and that said Crenshaw had the right to make the contract with Joseph Steiner & Sons, and complainants are bound thereby.

The argument used by counsel, and the only one employed on their part is: "When the trustee is clothed with the power to sell real estate, or any part thereof, then the sale by him is valid and conveys the legal title." There can be no dispute as to the correctness of the principle invoked, but at least, the question recurs whether or not Thomas C. Crenshaw had the power, reserved in his deed to his children, to sell the timber and trees on the land, disconnected with a sale of the land itself, and if so, did he by his conveyances to Steiner & Sons, and the extension of the latter agreement by his contract with the defendant company, legally convey the trees and timbers on said lands, disconnected with any conveyance of the lands themselves.

The deed of Thomas C. Crenshaw to his children, and the reservation of his power therein, to control and manage the property described, for the use and benefit of his said children named therein, until the youngest of them arrived at the age of twenty-one, and his right to sell and convey any portion of the same and reinvest the proceeds in other property for their use, is not referred to in either one of his said conveyances to the ¹³⁰ Steiners or the defendant, and no reference is made therein to his reserved powers in the deed to his children. The conveyance to the Steiners is simply one by him joined in by his two children, Louisa and Lillian Crenshaw, conveying to the grantees "all the cedar timber and cedar trees, standing or growing or lying down or fallen," on the lands described; and the other, to the defendant company, was executed by him alone, in consideration of the sum of two hundred dollars, extending the privilege or right to said trees and timber, as attempted to be granted to said Steiners, for three years from the expiration of said Steiner contract or conveyance. Said Thomas C. Crenshaw, confessedly, had an undivided fifth interest in the property, which interest had been reconveyed to him by his son Edward. The bill shows he conveyed this one-fifth interest afterward to his daughter, Lillian Wagner, under her then name of Lillian Crenshaw, but in so doing he reserved the right to use, control and manage the same for his own use and benefit during his life, and to sell, convey or mortgage all or any portion of it. These latter conveyances from his son to him, and from him to his said daughter, Lillian, were executed after the said conveyance to the Steiners, but long before the one executed by him alone to the defendant company, in extension of the Steiner conveyance. It is shown that all the children of

said Thomas C. were of full age prior to the time of said extension agreement.

It is thus made to appear that in respect to his creditors and purchasers, the said Thomas C. Crenshaw had an undivided one-fifth interest in said lands—the trees and timbers on which he had the right to sell—in his own right, disconnected with his power to sell the remaining four-fifths interest, under the power reserved under his said deed to his five children.

As to the proper execution of the power reserved by said Thomas C. in his said deed, we have said that he made no reference to said deed in his sale of the timbers and trees to said Steiners, nor in the one to the defendant. On the proper execution of such a power, Mr. Devlin observes: "It is not absolutely necessary to the execution of a power that the deed should recite ¹³¹ or refer to it. But when the grantor in a deed has an estate which will pass without an execution of the power, and the deed is silent on the interest to be conveyed, the law will presume that he intended to convey the estate that he possessed and no more": 1 Devlin on Deeds, sec. 423. On the same subject, Chancellor Kent states that: "The general rule of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and an act be done, without a particular reference to the power, it will be applied to the interest, and not the power. If there be any legal interest on which the deed can attach, it will not execute a power. If an act will work two ways, the one by an interest and the other by a power, and the act be indifferent, the law will attribute it to the interest and not to the authority, for *fictio cedit veritati*": 4 Kent's Commentaries, 335.

We have indulged the foregoing extracts from Devlin and Kent, as placing the contention of the appellee—that there was no execution of the power reserved to himself in his deed to his children, when he executed the deed to the Steiners and the one in extension of it to defendant—on the strongest grounds on which the authorities place it. But the technical rule as thus stated, which at one time in many cases seems to have prevailed, has undergone modification, for the sake of sustaining and not defeating what may appear to be the intention of the grantor.

In *McRae v. McDonald*, 57 Ala. 423, this court said that it is not necessary that an intention to execute a power of sale should expressly appear upon the face of the instrument; but that it was sufficient if it appear by words, acts or deeds, clearly

demonstrating that intention: 2 Story's Equity Jurisprudence, sec. 1062a.

The same principle is announced in *Matthews v. McDade*, 72 Ala. 387, where, making reference to the case just cited, it is said that: "It must be apparent that the transaction in question is not fairly and reasonably susceptible of any other interpretation, than as indicating an intention to execute the power; and this intention is to be collected from all circumstances": 132 Citing *Sir Edward Cleres' Case*, 6 Coke, 17; *Pomeroy v. Partington*, 3 Term Rep. 665.

In *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596, 60 Am. Rep. 769, 2 South. 327, the question in hand, on reference to many English and American authorities, underwent elaborate discussion. Quoting Judge Story in *Crane v. Morris*, 6 Pet. 588, "that it is sufficient if the power exists, and is intended to be executed, and that this is a matter in pais, to be collected from all the circumstances of the case"; and from Kent (4 Kent's Commentaries, 334), that "the power may be executed, without reciting it, or referring to it, providing that the act shows that the donee had in view the subject of the power," the court said: "The early English cases on the subject established a rule which so frequently operated to defeat the intention of grantors and testators, as to require a decided departure from it, accompanied with frequent criticisms of its unsoundness by the most learned judges. In one case Lord Eldon was induced to declare that he was 'not sure the rule did not oblige the court to act against what might have been the intention nine times out of ten': *Nannock v. Horton*, 7 Ves. Jr. 398. In another case an eminent vice-chancellor said: 'I must, although almost ashamed to say it, decide against what I firmly and sincerely believe to have been the intention of the testatrix, that the power of appointment has not been executed. I am bound, however, by the authorities. I cannot help myself, and I must so decide': *Davies v. Thorns*, 2 De Gex & S. 347. So, in another case, Sir William Grant was forced, as a judge, to reach a conclusion which his judgment as a jurist repudiated: *Jones v. Tucker*, 2 Mer. 533."

In *Blagge v. Miles*, 1 Story, 426, Fed. Cas. No. 1479, Judge Story, discussing the struggle long waged, as to whether the intention of the testator was to prevail, or whether a technical construction of law, given to certain phrases, was to prevail over intention, remarking that this struggle at last seemed to have terminated in favor of the intention of the testator, says: "I

apprehend that similar doctrines now prevail in regard to the execution of powers. . . . The main point is to arrive at the intention and object of the donee of the ¹³³ power in the instrument of execution; and, that being once ascertained, effect is given to it accordingly. The authorities may not all be easily reconcilable with each other. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be, in other respects, unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative."

It is said in Tiedeman on Real Property, section 569, that: "The courts have, of late years, so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any other way, notwithstanding the deed or will purports to dispose only of individual property of the donee." Touching the same subject, Mr. Washburn (2 Washburn on Real Property, 713) says: "An inference as to the intention may be drawn from the character of the property of the donee of the power. If his property not subject to the power is so small, or of such a nature that the descriptions of the property in the deed or will are meaningless unless construed as applying to the property subject to the power, the deed or will will be construed as an execution of the power. Thus, if one have a life estate in land, and a power of appointment in fee, and conveys the fee, it is an execution of the power": *Bishop v. Remple*, 11 Ohio St. 277, and other cases cited in *Gindrat v. Montgomery Gas Light Co.*, 82 Ala. 596, 60 Am. Rep. 769, 2 South. 327. "When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it": *Hall v. Preble*, 68 Me. 100; *South v. South*, 91 Ind. 221, 46 Am. Rep. 591; *Funk v. Eggleston*, 92 Ill. 515, 34 Am. Rep. 136.

By the deed of T. C. Crenshaw, of the 9th of April, 1873, he conveyed to his children two thousand three hundred and thirty-six acres of land. In it he says, to repeat what we may have in substance said: "I hereby reserve to myself the right to control and manage the property hereinabove conveyed, for the use and benefit of said named children, until the youngest child arrives at the age of twenty-one years; and I also reserve the ¹³⁴ right to sell and convey any portion of the same, and reinvest the funds in other property for the exclusive use and benefit of said children," followed by a warranty of title to them.

In the deed executed to the Steiners by himself and two daughters, on the 18th of December, 1888, he granted and sold to them, for the sum of two thousand seven hundred dollars, as has been stated, all the cedar timber and cedar trees now standing or growing or lying down or fallen in and upon six hundred and forty acres of said land, excepting the fence rails and fences, and all the cedar cabins and houses and hewn cedar timber on said lands, together with the right of ingress and egress over said lands and all other lands of the grantors adjoining and contiguous to said lands, for the purpose of getting, cutting, sawing, manufacturing, removing, using, and otherwise disposing of the cedar trees and timbers conveyed, which privilege was to last for ten years, and thereafter all the trees and timbers remaining on said lands were to be the property of the grantors. This was followed by covenants of warranty that the grantors were seised of the lands and had a good right to sell the timbers and trees therefrom.

From this it plainly appears that the intention of the grantors was to sell the entire interest in the said trees and timbers; that the object of the execution of the power by said Crenshaw, and of the Steiners in purchasing, was that all the trees and timbers on said lands should be sold and pass to the Steiners, for the purpose of an immediate cutting, sawing, manufacturing and using in any profitable way. No other intention can be ascribed to the sellers or purchasers. If said Crenshaw did not intend to execute the power reserved in him, and intended merely to pass to the grantees his undivided one-fifth interest in the trees and timbers on the six hundred and forty acres, the whole purpose of the transaction would disappear. It would have been valueless to the grantees for the purposes expressed in the deed. The price received would seem to have been entirely disproportionate as consideration for an undivided fifth interest. No such intention can be fairly derived from the terms, conditions and circumstances ¹³⁵ of the case, but is absolutely foreclosed therefrom. All these circumstances indicate too clearly not to be believed that in conveying the trees and timbers for value, he engaged with the grantee to make the deed as effectual as he had the power to do. The fact that his two daughters joined with him in the execution of the power is no argument against his execution of it, and implies the rather that they aided him to do so, by the sanction of their names and the conveyance of their interest.

It has been seen that in his Steiner deed, of which the defendant's deed purports to be a mere extension, said Crenshaw con-

veyed merely the cedar trees and timbers disconnected from the land itself. It is contended by the complainants that this was not a valid execution of the power reserved in said Crenshaw, as the trees and timbers under his power could not be disposed of by him without a sale of the land itself. It may be admitted, as stated in an old case which counsel refer us to, that "the law doth not favor fractions and severances of trees from the freehold and inheritance of the land, because the trees would be thereby often wasted and destroyed": *Liford's Case*, 6 Coke, 46, 48. In *Heflin v. Bingham*, 56 Ala. 574, 28 Am. Rep. 776, it was said: "Growing trees are a part of the realty, and a sale of them, without a compliance with the terms of the statute of frauds, does not pass the title." If one, therefore, sells and conveys his land, without any reservation of the timbers on it, the conveyance will pass the trees and timbers thereon. As said by Mr. Tiedeman: "A grant of lands, therefore, without any qualification, conveys not only the soil, but everything else which is attached to it, or which constitutes a part of it, the buildings, mines, trees, growing crops, etc. Even trees which have been cut and are lying upon the land have been said to pass with the land": *Tiedeman on Real Property*, sec. 2, and authorities there cited. But this rule does not apply, where there is a reservation in the grant of the timbers and trees on land sold, nor to structures which would pass thereunder, where there is privilege reserved to remove them: *Harris v. Powers*, 57 Ala. 139.

¹³⁶ In the deed before us, however, the grantor reserved to himself, as we have seen, the right to control and manage the property conveyed (to his children) for their use and benefit, until his youngest child arrives at the age of twenty-one years, and also the right to sell and convey any portion of the same, and reinvest the proceeds in other property for their use and benefit. These trees and timbers were a valuable portion of the property conveyed, and in the proper control and management of the same, the best interests of the beneficiaries might well have required him to sell the same, reserving the land, and to do so, certainly fell within his power to dispose of a portion of the property.

The demurrer in two separate grounds, as before stated, sets up: 1. That the said T. C. Crenshaw had the power and the right to make the Steiner contract; and 2. That he had the right to make the said contract for the extension of the same with defendant. From what has appeared, the first of these was improperly overruled. If it be objected that this ground of de-

murrer goes only to a part of the bill, it may be replied that if the said Crenshaw deed was changed before delivery, as set up for relief in the second alternative aspect, it is clear the bill fails to make a case of equitable cognizance, and being bad in this respect, subjected it as a whole to this ground of demurrer, which defect was properly taken advantage of in that way: *Taylor v. Dwyer*, 129 Ala. 325, 29 South. 692; *Seals v. Robinson*, 75 Ala. 363.

As we have seen, the bill shows that said extension agreement to defendant was made by said T. C. Crenshaw alone, without any of his children joining in it with him, and that prior to its execution, all of his children were of full age. It is manifest, if the duration of the trust was until the youngest child of said Thomas C. Crenshaw arrived at the age of twenty-one years, as the bill alleges the case to be, then the trust and power had elapsed when he executed said extension agreement, and he conveyed thereby no greater interest than his own, which was an undivided fifth interest, but that much he had the right to dispose of to defendant, which right he exercised. It is equally manifest, ¹³⁷ if the change in the deed—making the duration of the trust for the life of said Thomas C. Crenshaw, instead of until the youngest child arrived at the age of twenty-one years, as is claimed by defendant to have been done—was effected before its delivery, that said extension agreement was within the power reserved by said Crenshaw, and the said extension contract stood, in this respect, on the same footing with the Steiner deed. How this may be is a question of fact, to be ascertained in the future progress of the case.

3. Mary Davis, one of the children of said Thomas C. and beneficiaries under his said deed to his children, died in Lowndes county, Alabama, in 1886, leaving an only child surviving her, whose name was Cleave, a minor over fourteen and under twenty-one years of age. Said Mary left property in Lowndes county, and in June, 1900, letters of administration were duly issued to A. Z. Davis, her husband. Said Cleave is joined as complainant, by his next friend, A. Z. Davis, his father. He claims and sues for the value of such portion of said trees and timbers as were cut and appropriated by defendant, prior to the death of his intestate mother.

It is objected that A. Z. Davis, individually, under these facts should have been made a party complainant. All that the defendant can ask is, that when it pays the debt it owes, if any, it shall receive a discharge. If A. Z. Davis, as the next

friend of his son, sues to recover the interest claimed, he would be forever concluded when defendant responds to his son, in case of recovery. Moreover, the demurrer goes to the whole bill, and in this it is too broad. It should have been directed to the part of the bill which seeks a recovery of Mrs. Davis' interest. The bill would be good, as for the other complainants, if that interest were eliminated from it.

4. The remaining objection that the administrator of Thomas C. Crenshaw, who died in November, 1899, is a necessary party to the suit, from the fact, as stated in argument, that deceased, "in conveying the timber which complainants are seeking to make appellants account for, conveyed the same by warranty deed, and a recovery by complainants would necessarily fix a liability on the estate of Thomas C. Crenshaw."

¹³⁸ There is nothing in this ground of objection. The complainants are seeking no recovery against the estate of said Crenshaw, and no damages they may recover in this suit against the defendant would be any basis for a recovery of damages by defending against said Crenshaw's estate. It would not be the same debt, nor a debt of the same nature as the damages that defendant might become entitled to recover, if any, against the said estate for a breach of covenant. In this suit the court would not, in any event, undertake such a decree in favor of defendant. The question of liability of said estate to defendant is one between it and the estate, and the question of damages here sought by complainants is one between them and defendant, on grounds distinct from any alleged breach of covenant by said intestate. If defendant has any right of recovery against said estate for such alleged breach, it would be the amount of the purchase money paid for the lands, with interest and costs of suit: *Prestwood v. McGowin*, 128 Ala. 257, 29 South. 387, and authorities there cited.

For the error as indicated in overruling the demurrer, the decree is reversed and the cause remanded.

Alteration of Deed.—A deed, so far as it has operated as a conveyance, is not avoided by alteration: *Burgess v. Blake*, 128 Ala. 105, 28 South. 963, 86 Am. St. Rep. 78, and monographic note.

Delivery of Deed.—*The Recording* of a deed is *prima facie* evidence of delivery: *Shields v. Bish*, 189 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962; *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663. No formal delivery is necessary in such a case: *McReynolds v. Grubb*, 150 Mo. 372, 73 Am. St. Rep. 448, 51 S. W. 822.

Powers.—An act manifesting an intent to execute a power will be deemed an execution of it: *McCreary v. Bomberger*, 151 Pa. St. 323,

31 Am. St. Rep. 760, 24 Atl. 1066. But an instrument cannot be given effect as an execution of a power unless the intention of the donee of the power to execute it is so apparent that the instrument is not fairly susceptible of any other interpretation: *Mason v. Wheeler*, 19 R. I. 21, 61 Am. St. Rep. 734, 31 Atl. 426. A conveyance may operate as an execution of a power, though the grantor supposed himself to be the owner of the property, and the conveyance to be a transfer of his title: *Terry v. Rodahan*, 79 Ga. 278, 11 Am. St. Rep. 420, 5 S. E. 38. As to the necessity of the objects of a power being specified or ascertainable, see *Sweeney v. Warren*, 127 N. Y. 426, 24 Am. St. Rep. 468, 28 N. E. 413.

HUNDLEY v. COLLINS.

[131 Ala. 234, 32 South. 575.]

CORPORATIONS.—A Church or Religious Society may exist for all purposes for which it was organized, independently of any incorporation of the body under the statutes of the state. (p. 34.)

A COURT OF EQUITY Will Protect Religious Organizations in what they hold, in order to sustain trusts, because of their charitable uses which would otherwise be held void. (p. 34.)

AN INCORPORATED CHURCH Consists of Two Entities, the church as such, not owing its spiritual existence to the civil law, and the legal corporation. (p. 34.)

DEFINITION.—A Church is a Voluntary Association of Members, united together by covenant or agreement, for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spread of divine truth among others. (p. 35.)

AN INDEPENDENT CHURCH, not Subject to the Control of Any Higher or Ecclesiastical Judicature, is a law unto itself, self-governing and amenable to no court, ecclesiastical or civil, in the discharge of its religious functions. (p. 37.)

CHURCH MEMBERSHIP—Mandamus.—Where no Property Interest or civil rights are involved, mandamus will not lie to restore to membership one claiming to have been wrongfully removed from a church. (pp. 37, 38.)

Petition for mandamus to restore to church membership one who claims to have been wrongfully removed from the church.

Robert C. Brickell and Oscar R. Hundley, for the appellant.

Cooper & Foster, contra.

238 HARALSON, J. 1. The sections of the code under which the "Christian Church of Huntsville" was incorporated provide: "That members of any church or religious society desiring to be incorporated shall elect not less than

three, nor more than nine, trustees": Code, sec. 1302 (1694); that "such trustees shall, within thirty days after their election, file in the office of the judge of probate of the county in which the corporation is to exercise its functions, a certificate stating the corporate name selected, the names of the trustees, and the length of time for which they were elected, which certificate shall be subscribed by them and recorded. The members of such society, their associates and successors, are, from the filing of such certificates, incorporated by the name therein specified": Code, sec. 1303 (1695).

The succeeding section, 1304 (1696), provides that corporations created under this article of the code may hold real and personal property, not exceeding in value fifty thousand dollars, may receive property by gifts, will or devise, holding the same in conformity with all lawful conditions ²³⁹ imposed by the donor, and exercise such other powers as are incident to private corporations.

Section 1305 (1697) provides how suits may be commenced against such corporations, and section 1306 (1698) how mortgages on any part or all of the property of the corporation must be executed.

2. It is to be observed that these provisions of the code for the incorporation of churches or religious societies, and all powers conferred thereunder, relate alone to their properties or temporalities, and have no reference to the churches or societies as such, which bodies, as spiritual or ecclesiastical organizations, exist independent of their charters. A church or religious society may exist for all the purposes for which it was organized, independently of any incorporation of the body under the statutes of the state; and it is a matter of common knowledge that many do exist and are never incorporated. For the promotion of religion and charity, they may subserve all the purposes of their organization, and, generally, need no incorporation except incidentally to further these objects. They do not place themselves beyond the pale of the protection of the law as to properties, for the lack of incorporation. It is the province of a court of equity to protect such organizations in what they hold, in order to sustain trusts, because of their charitable uses which would otherwise be held void: *Williams v. Pearson*, 38 Ala. 299; *Burke v. Roper*, 79 Ala. 138; 20 Am. & Eng. Ency. of Law, 1st ed., 804, 811.

Wherever there is an incorporated church, there are two entities—the one, the church as such, not owing its ecclesiastical

or spiritual existence to the civil law, and the legal corporation, each separate though closely allied. The church, in the ordinary acceptation of the word, is a voluntary association of its members, united together by covenant or agreement, for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spread of divine truth among others, as they understand and teach it. It is purely voluntary, and is not a corporation nor a quasi corporation: *Parker v. May*, 5 Cush. 345; 20 Am. & ²⁴⁰ Eng. Ency. of Law, 775. On the other hand, a corporation is formed for the acquisition and taking care of the property of the church, and is in no sense ecclesiastical in its functions.

In *Sale v. First Regular Bap. Church*, 62 Iowa, 26, 49 Am. Rep. 136, 17 N. W. 143, the church was incorporated, and the proceeding was by mandamus to reinstate a member expelled by the church. In drawing the distinction between the church and the corporation the court said: "The only and primary object of the corporation is the acquisition and taking care of property. The rules of the church as to the discipline of members have no relation to the corporate property or corporate matters. . . . By virtue of her church membership, the plaintiff became a member of the corporation, organized for religious and ecclesiastical purposes. The corporation was not organized for pecuniary profit. No such profit can accrue to any member. No property interest, or any other valuable civil right, has been affected by the action of the church. The plaintiff has not, and cannot, suffer any civil damages whatever. This view is in harmony with *Hardin v. Baptist Church*, 51 Mich. 137, 47 Am. Rep. 555, 16 N. W. 311, where numerous authorities are cited." In this case it was held that mandamus would not lie to restore to membership one claiming to have been wrongfully removed from a church, notwithstanding that church membership was a condition of membership of the corporation. We refer in this connection to the case of *Ryan v. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. 760, and as reported in the forty-ninth volume of the *Lawyer's Reports Annotated*, 353, where will be found on page 384, under the head of "Ecclesiastical Tribunals," a synopsis of the decisions of a great number of courts on the subject in hand, sustaining the views we announce.

"The two bodies, viz., the corporation and the church, although one may exist within the pale of the other, are in no

respect correlative. The objects and interests of the one are moral and spiritual; the other deals with things purely temporal and material": *Petty v. Tooeker*, 21 N. Y. 267; *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874.

The foregoing is quite sufficient to show that the spiritual entity of a church, made up of members belonging ²⁴¹ to it, existing without any special law to that effect, is a different and distinct body, in the contemplation of law, from the same body when incorporated under statutes for the purpose—the two having different functions to perform, the one religious, and the other civil.

Under our statutes for the incorporation of churches, it is to be noted that the members of the church become incorporated, and not simply the trustees required to be elected preparatory to proceeding in the court of probate to obtain incorporation. It was a proper, simpler and less troublesome proceeding, consulting the conveniences of the church, that certain designated members should be chosen to perform this service for and on behalf of all the members, rather than require all the members themselves to do so. The trustees having been elected, all they are required to do to complete the incorporation under the statute is, within thirty days after their election, to file in the office of the judge of probate the certificate required by section 1303 (1695) of the code, and the members of the church, from the filing of such certificate, become incorporated by the name therein specified. Each member is an incorporator, recognized as a legal civil body distinct from the church as a spiritual body, theretofore and thereafter continuously existing.

In this case it is alleged the petitioner was both a trustee and elder of the church. To be a trustee, the statute required him to be a member of the church; and it also appears that under the rules of the church, elders must be members. Trusteeship and eldership are then dependent upon membership in the church. It follows, if one is excluded from membership, his office of trustee or elder ceases by virtue of the act of exclusion. Each of these offices, it appears, is filled by the members of the church, acting as a church.

It is averred in the petition that on the 11th of July, 1900, at a meeting of such members of the church as were then assembled, such action was taken as was intended to be an exclusion of petitioner from said church. The petitioner treats the act as one of exclusion, since the prayer of the petition is that he "be restored to membership ²⁴² in said church, and to his re-

lation as elder therein and thereof." It is not pretended, nor can it be, that this act was done by the corporation, and not by the church. The petition sets out a paper drawn and presented as the foundation of the church's action. It begins by an admonition addressed to the "Dear brethren and sisters"—an address of Christian endearment usual among church people—reminding them that it is their solemn duty to obey the word of God, in that it commands them to withdraw themselves from every brother that walketh disorderly, proceeding to aver wherein the petitioner and certain others had been guilty of disorderly conduct, and ends by declaring it to be their duty to withdraw Christian fellowship from petitioner and others. No one can presume that such a paper referred to the brethren and sisters of the church in their corporate capacity; but by the language employed it must be supposed—since it is not applicable in any other connection—that those addressed were the members of the church sitting in conference, where the spiritual well-being and concerns of the ecclesiastical, spiritual body were to be considered and passed on. There were no property interests involved, nothing touching what are termed the temporalities of the church as contradistinguished from its spiritualities. The petitioner had no pecuniary interests, in any direction, involved in the proceeding, and it did not touch any of his civil rights at any point. It may be the church proceeded irregularly according to common usage in such cases; but it is averred that this church "is of the denomination known as 'Disciples of Christ,' of which Alexander Campbell was the original preacher, if not the founder," and that "each church is of itself independent, not subject to the control of any higher or ecclesiastical judicature." As an ecclesiastical body, therefore, it was a law unto itself, self-governing and amenable to no court, ecclesiastical or civil, in the discharge of its religious functions. It could make and unmake its rules and regulations for the reception and exclusion of members, and in reference to other matters; and what other body religious or civil could question its right to do so? Certainly, if it violated no civil law, the arm of civil ²⁴³ authority was short to reach it. Admitting, therefore, as we must on demurrer, that petitioner had no notice of this proceeding, and that it was irregular according to common usage, the church being independent, and not subject to higher powers, and being a law unto itself for its own procedure in religious matters, what it did toward the expulsion of petitioner was not unlawful, even if it was not politic and

wise. If the civil courts may in this instance interfere to question the exclusion of petitioner, they may do so, in any instance where a member of that or any other church is removed, on the allegation of irregular and unfair proceedings for the purpose. This would open a door to untold evils in the administration of church affairs, not consistent with the principles of religious freedom as recognized in this country, where there is no established church or religion, where every man is entitled to hold and express with freedom his own religious views and convictions, and where the separation of state and church is so deeply entrenched in our constitution and laws. These views are in accord with the decisions of other states and of the supreme court of the United States.

In *Nance v. Busby*, 91 Tenn. 303, 18 S. W. 874, which is an exhaustive opinion on the subject, on review of many authorities, and directly applicable to the conditions of this case, it was said by the court, through Judge Lurton: "The relations of a member to his church are not contractual. No bond of contract, express or implied, connects him with his communion, or determines his rights. . . . The church undertakes to deal only with the spiritual side of man. It does not appeal to his purely human and temporal interests. Admission to its fold is prescribed alone by the church, professing to act only upon the word of God. It claims the power of the keys by divine, and not human, authority. Its right to determine the grounds of admission has never been questioned. Why shall the co-ordinate right of exclusion be scrutinized by the civil power? . . . Civil courts deal only with civil and property rights. If, to determine a property right, it becomes necessary to adjudicate an ecclesiastical question, the courts will go only so far as is necessary to determine the effect of **244** ecclesiastical law or relations on property rights. We are not to be understood as approving an expulsion from church membership by irregular methods and without notice to the member. But here we have a fact to deal with—the fact that this church, sitting as a court, has determined for itself that it had the power and the right to exclude these complainants. They have, as a judicature, adjudged that they had jurisdiction, and that the usage and law of the church did not demand other trial or notice than such as attended the public action of the church. The law of the church provides for no appeal to a higher tribunal. They may have erred in their procedure. It is not for a civil court to revise their action in a

matter so vital to their freedom as a church. . . . We have been referred to no reported case where any civil court in this country has undertaken to overrule the fact of excommunication upon any ground whatever."

In *Shannon v. Frost*, 3 B. Mon. 253, it was said: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or exclusion. Our only judicial power in the case arises from the conflicting claims of the parties to the property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. . . . When they [the complainants] became members, they did so on the condition of continuing or not, as themselves and their church might determine. In that respect they voluntarily subjected themselves to the ecclesiastical power, and cannot invoke the supervision or control of that jurisdiction by this or any other civil tribunal."

In the leading case of *Watson v. Jones*, 13 Wall. 679, on this subject, where Justice Miller reviews the ²⁴⁵ cases, English and American, and maintains the doctrine of the noninterference by state courts over ecclesiastical bodies in matters of religion, it is said: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decisions of questions arising

among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeal as the organism itself provides for. . . . It is easy to see that if the civil courts are to inquire into all of these matters (theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them), the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive those bodies of the right of construing their own church laws, and would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts, when property rights were concerned the decision of all ecclesiastical questions. . . . In this class of cases we think the rule of action which should govern the civil courts founded in a broad and sound ²¹⁶ view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that whenever the questions of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

In *McNeil v. Bibb St. Church*, 84 Ala. 23, 4 South. 40, this court said: "In accordance with the principles of our institutions, and the organic law, the courts refrain from interfering when the office or functions are purely ecclesiastical or spiritual, disconnected from any fixed emoluments, salary, or other temporalities. In such case there is no legal, temporal right, of which the civil courts can take jurisdiction." There can be no difference in the principles announced as argued by appellant's counsel, whether they are sought to be applied in a court of law or in courts of equity.

It is clear from what has been said, without reference to alleged defects in the petition for mandamus, making it, as contended, unavailable in this case, that there was no error in the ruling of the court below in denying the mandamus, sustaining the demurrer to the petition and dismissing it.

Affirmed.

Voluntary Associations.—The jurisdiction of equity over fraternal, religious, and other associations and societies is considered in the monographic notes to *Kearns v. Howley*, 68 Am. St. Rep. 856-871; *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 160-170; and the recent case of *Hatfield v. De Long*, 156 Ind. 207, 83 Am. St. Rep. 194, 59 N. E. 483. As to the remedies of members of such associations, see the monographic note to *Robinson v. Templar Lodge*, 59 Am. St. Rep. 198-209. It has been held that a religious society cannot be compelled to reinstate a member expelled from the church, when the expulsion was not by an act of the corporation and did not affect any interest in property: *Sale v. First Baptist Church*, 62 Iowa, 26, 49 Am. Rep. 136, 17 N. W. 143. Nor will an action lie against the trustees of a religious society for an expulsion from the church organization connected with it: *Hardin v. Trustees of Second Baptist Church*, 51 Mich. 137, 47 Am. Rep. 555, 16 N. W. 311.

DOYLE v. FIRST NATIONAL BANK.

[131 Ala. 294, 30 South. 880.]

NEGOTIABLE INSTRUMENTS.—In Computing Time upon a note payable a certain time "after date," the day of the date of the note should be excluded. (p. 42.)

TIME.—When a Note is payable so many months after date, calendar months are intended. (p. 42.)

TIME, Computation of.—A Note dated November 11th and payable "six months after date," matures on the eleventh day of May following. (pp. 42, 43.)

F. E. Blackburn, for the appellant.

E. J. Smyer, contra.

295 DOWDELL, J. The plaintiff brought this action to recover damages from the defendant bank for an alleged wrongful protest by said bank of a note made and executed by plaintiff. The note in question reads as follows:

"52.50. Birmingham, Alabama, Nov. 11, 1899.

"Six months fixed after date I promise to pay to the order of Mrs. E. L. Watts fifty-two and 50-100 dollars. Value received, with interest from maturity until paid. Payable at the First National Bank of Birmingham, Alabama. The makers and indorsers of this note hereby expressly waive all right to claim exemption allowed by the constitution and laws of this or any other state, and agree to pay cost of collecting this note, including reasonable attorney's fees, for all services rendered in any way, ²⁹⁶ in any suit against any maker or indorser, or in

collecting or attempting to collect, or in securing or in attempting to secure this debt, if this note is not paid at maturity. Notice and protest on the nonpayment of this note is hereby waived for each maker and endorser.

[Signed] "MARK DOYLE."

The indorsements on the note were as follows: "E. L. Watts," and "Pay to First National Bank or order," signed, "Industrial Ins. Co., Sam T. Hurst, Jr., Cashier."

The note was protested for nonpayment on May 11, 1900. It is conceded that by the terms of the note, "six months fixed after date," precluded the idea of days of grace, and it is not contended by appellant that he was entitled to the three days of grace, nor is it contended that the provision contained in the note, waiving notice and protest, took away from the holder the right to have the same protested for nonpayment on the day of its maturity: *Bellinger v. Glenn*, 80 Ala. 190, 60 Am. Rep. 98; *White v. Keith*, 97 Ala. 668, 12 South. 611.

The vital question in this case is as to whether or not the note was protested before its maturity, the contention of the appellant being that the note did not mature until the twelfth day of May, whereas it was protested on the eleventh day, and the contention of appellee being that the note matured on the eleventh, the day of its protest for nonpayment. By the terms of the note it became due and payable six months after date. In *Donegan v. Wood*, 49 Ala. 252, 20 Am. Rep. 275, upon a similar question, it was held, in computing the time, that the day of the date of the note should be excluded. It was there said: "In this case the bill is dated on the thirtieth day of January, 1861, and is payable twelve months after date. This language excludes the day of the date, which would make the day of payment, exclusive of the days of grace, fall on the thirty-first day of January, 1862." We approve of what was there said as to the exclusion of the day of date in computing the time, but it is quite evident that the court fell into an error in its computation. There can be no question that when a note is payable so many ²⁹⁷ months after date, that calendar months are intended. If in the present case the day of the date of the note—that is, the eleventh day of November—be excluded from the computation, and beginning with and including the twelfth day of November, the six months would expire on and with the eleventh day of May succeeding. If, as contended by appellant, the twelfth

day of May was the day of maturity and payment, the maker would then be given, instead of six months according to the terms of the contract, six months and a day. From this it will be seen that a correct computation of time, excluding the day of the date of the instrument, would fix the maturity of the note on the eleventh day of May following, and the same would be subject to protest for nonpayment on that date: See 4 Am. & Eng. Ency. of Law, 2d ed., 369; Hartford Bank v. Barry, 17 Mass. 94; Roehner v. Knickerbocker Ins. Co., 63 N. Y. 163. This view of the case renders it unnecessary to notice the other assignments of error, as the errors complained of, if errors at all, are without injury.

Affirmed.

In Computing Time, the first day is usually excluded: See the monographic note to State v. Michel, 78 Am. St. Rep. 372-375. This rule is not applicable when years are to be computed: Aultman & Taylor Co. v. Syme, 163 N. Y. 54, 79 Am. St. Rep. 565, 57 N. E. 168. When the term "month" is used, and there is nothing to indicate a different meaning, it is construed as a calendar month. And in computing a calendar month the days are not counted, but reference is made to the calendar: See the monographic note to State v. Michel, 78 Am. St. Rep. 384, 385. A term of months expires on the day of the last month corresponding to the day of the month in which the term began, and if the last month has not so many days, then on the last day of that month: Daley v. Anderson, 7 Wyo. 1, 75 Am. St. Rep. 870, 48 Pac. 839.

PATTON v. WATKINS.

[131 Ala. 387, 31 South. 93.]

ELECTIONS.—Statutory Provisions Relating to Procedure in elections are directory merely, unless their disregard be made expressly vitative. (p. 45.)

ELECTIONS—Irregularities.—The fact that no booths were provided for the occupation of voters while preparing their ballots, or that the polls were closed during the noon hour, are not such irregularities in conducting an election as will render the votes invalid. (pp. 44, 45.)

ELECTIONS.—Dereliction in Respect of Official Duty pertaining to an election may render the culpable officer amenable to penal laws without affecting the validity of the votes cast. (p. 45.)

ELECTIONS.—Under a Statute Allowing Illiterate Voters the assistance of an official marker to prepare their ballots, on making oath of their disability, the fact that no oath is taken is not such an irregularity as will make the vote illegal, if in fact the disability existed. (pp. 45, 46.)

ELECTIONS—Illegal Votes.—Where a Statute Allows Illiterate Voters the assistance of an official marker to prepare their ballots, the marker is prohibited from exercising any discretion in selecting candidates for the voter assisted, and the substitution of his own for the voter's choice will render such ballots void. (p. 46.)

C. P. Beddow and F. E. Blackburn, for the appellant.

Walker Percy, contra.

388 SHARPE, J. At an election held to fill the office of constable contestant and contestee were opposing candidates. There were two polling places in the precinct. At one of them contestant received a majority of the votes. At the other the contestee received a larger majority, and was accordingly declared elected. This result was contested in the probate court, and was sustained by the judgment of the probate judge sitting without a jury. The evidence from which error in the judgment is sought to be shown relates only to the last-mentioned polling place. It shows that at that place no booths were provided for the occupation of voters while preparing their ballots; that ballots were prepared in a room adjoining that occupied by the inspectors, and that many voters had their ballots marked by W. T. Skinner, an official marker, without making oath to their own inability to do so as prescribed by section 1623 of the code. It also shows that instead of keeping the polls open continuously from the hour of opening to the legal hour of closing, the inspectors left the polling place and remained away from it for about an hour and ten minutes while at dinner, and that though they carried the ballot-box with them when going to dinner, it was out of their sight. On the trial there was evidence, but with which Skinner's testimony was in conflict, tending to show that he acted in marking ballots cast by illiterate voters without any expression from those voters indicating for whom they desired to vote.

The statutes providing for contests for election disclose a policy adverse to disturbing results declared by election officers wherever they are supported by true estimates of the legal votes cast. No malconduct, whether of officers or of persons, will furnish cause for setting aside an election "unless thereby the person declared elected, and whose election is being contested, be shown not to have received the highest number of legal votes, nor must any election contested under the **389**

provisions of this code be annulled or set aside because of illegal votes given to the person whose election is contested, unless it appears that the number of illegal votes given to such person, if taken from him, would reduce the number of votes given to him below the number of legal votes given to some other person for the same office": Code, sec. 1668. In the trial of contests no provision is made for investing with the office any person other than the one whose election is declared, unless such other person "received, or would have received had the ballots intended for him illegally rejected been received, the highest number of legal votes": Code, sec. 1700. A vote cast by a legally qualified elector at an election held by the proper officers at a time and place designated by law is not made illegal by a failure to observe a mere direction given by statutes as to the mode of conducting the election. In general, statutory provisions relating to procedure in elections are directory merely, unless their disregard be made expressly vitative: Paine on Elections, sec. 497; McCrary on Elections, sec. 200. No such consequence of nonobservance is expressed in the statutes which require that the sheriff shall furnish booths, and that the polls be kept open without intermission during the legal hours for voting, or in that which directs that the voter shall occupy a booth alone while preparing his ballot, or in that which requires him to make an affidavit on applying for assistance of an official marker in such preparation. Dereliction in respect of official duty pertaining to election may be of such kind as to render the culpable officer amenable to penal laws without affecting the validity of votes cast under his ministration, and this principle applies to the irregularities imputed to official misconduct of the sheriff and of the managers at this election. To be entitled as a matter of right to assistance in preparing his ballot, the voter must make affidavit of his own inability to prepare it. But it is the fact of disability, rather than the sworn declaration, that merits the assistance for which the law provides. The oath is required only as evidence of the fact. If an official marker, being assured that an elector is, by reason of illiteracy ³⁹⁰ or otherwise, unable to mark his ballot so as to vote according to his choice, assists him to do so, the fact that the oath is not taken or required, though constituting an irregularity, does not make the vote illegal. But the sole function of a marker is to perform the mechanical act of preparing the ballot. His duties are defined by the statute (Code, sec. 1623), which

provides that a disabled or illiterate elector "may have the assistance of a marker, to be selected by him from the number of markers appointed by the inspectors, or, in the event no markers are available, of an inspector to be selected by him, for the preparation of his ballot, and the marker or inspector so selected shall retire to a booth or compartment with the elector and there mark the elector's ballot by marking with pen and ink, or pencil or stencil, cross-marks (X) before the name of each candidate for each office to be given to him by the elector, without suggestion or interference from the marker or inspector. The marker or inspector assisting the elector shall then deliver the ballot to the elector and withdraw from the booth or compartment." From this it is seen that the exercise of all discretion in the selection of candidates for the voter assisted is prohibited to the marker, and that the substitution of his own for the voter's choice in such selection is a flagrant violation of an official trust. Such malconduct amounts furthermore to a fraud which vitiates the ballot so prepared, and deprives it of the quality of legality. There is testimony which, if believed, warrants the conclusion that more than ninety ballots cast and counted for the contestee were prepared by Skinner, and that in marking them he acted without advice or instructions of the electors by whom they were cast. A majority of the court are of the opinion that this fact is established by evidence which clearly outweighs the testimony contradicting it, and overcomes such presumption of correctness as the trial court's judgment is entitled to. It follows that these marked ballots are void, and cannot be taken as representing votes. By rejecting them it is made to appear that contestant received the highest number of legal votes. Accordingly ³⁹¹ the judgment appealed from will be reversed, and one will be here rendered declaring the contestant duly elected to the office in question: Code, sec. 1700.

Reversed and rendered.

WHAT IRREGULARITIES WILL AVOID ELECTIONS.

- I. Introduction.
- II. Election Districts.
 - a. Irregularities in Establishing.
- III. Election Officers.
 - a. Defects in Appointment.
 1. In General.
 2. Improper Number Appointed.

3. Failure to Take Oath.
4. Not Appointed by Proper Authority.
5. Two Sets of Officers.
6. Ineligible Officers.
7. Candidate Acting as Officer.
- b. Absence of Election Officers.
- c. Misconduct of Election Officers.
 1. Mere Irregularities.
 2. Willful Misconduct.

IV. Registration of Voters.

- a. Necessity of Registration.
- b. Irregularities in Registration.
 1. In General.
 2. Registration by Wrong Officers.
 3. Refusal to Register Voters.
 4. Time for Registration.
 5. Place of Registration.
 6. Failure to Properly Prepare Register.
- c. Unconstitutional Registration Law.

V. Nomination of Candidate.

- a. Irregularities.

VI. Calling or Ordering an Election.

- a. Calling Election in General.
- b. Calling Special Election.
 1. Call by Wrong Officers.
 2. Election to Fill Vacancy.
 3. Before Statute Goes into Effect.
- c. Petitioning for Election.
 1. When Petition Necessary.
 2. Contents of Petition.
- d. Ordering Election.
 1. Necessity of Order.
 2. Irregularities in Passing Order.
 3. Contents of Order.
- e. Necessity of Writ of Election.

VII. Holding Election.

- a. In General.
- b. Place of Holding Election.
- c. Time of Holding Election.
 1. In General.
 2. Within Prescribed Time After Petition.
 3. Election at Adjourned Meeting.

VIII. Notice of Election.

- a. Necessity.
 1. In General.
 2. Where no Notice Given.
 3. Where Time of Election is Fixed.

- b. Notice of Special Elections.
 - 1. Necessity.
 - 2. Failure to Give Full Statutory Notice.
 - 3. Notice of Election to Fill Vacancy.
- c. Manner of Giving Notice.
 - 1. Failure to Give Notice in Required Manner.
 - 2. Posting Notice.
 - 3. Contents of Notice.

IX. Conduct of Election.

- a. Irregularities in General.
- b. Effect of Statutory Provisions.
- c. Presence of Persons at Polling Place.
- d. Registration or Poll Books.
 - 1. Failure to Furnish.
 - 2. Failure to Properly Use.
- e. Polling Place.
 - 1. Polling Place Outside Election District.
 - 2. Election at Other Than Established Polling Place.
 - 3. Change of Polling Place.
 - 4. Number of Polling Places.
 - 5. Failure to Open Polls in Certain Precincts.
- f. Time for Voting.
 - 1. Opening of Polls.
 - 2. Closing Polls too Soon.
 - 3. Failure to Close on Time.
- g. Voting.
 - 1. In General.
 - 2. Use of Ballot-boxes.
 - 3. Use of Ballots.
 - 4. Assistance to Voters.
 - 5. Preparation and Use of Booths.
 - 6. Rejection of Votes.
 - 7. Receiving Illegal Votes.
 - 8. Failure of Electors to Vote.
- h. Effect of Void Precinct Vote.
- i. Effect of Fraud.
- j. Effect of Bribery.
 - 1. In General.
 - 2. Offer of Candidate to Donate Salary.
- k. Illegal Expenditures by Candidate.
- l. Effect of Intimidation and Violence.

X. Count of Votes.

- a. Irregularities in General.
- b. Presence and Participation of Other Than Officers.

XI. Returns.

- a. Irregularities in Returns.
- b. Misconduct of Officers.
- c. Failure to Make Returns.

XII. Failure to Properly Preserve Ballots.**XIII. Canvass of Returns.****a. Effect of Irregularities.****I. Introduction.**

The numerous election contests of recent years particularly have served to quite firmly establish the rules governing elections, and to ascertain the character of irregularities which are essential to avoid an election. The tendency is clearly and distinctly noticeable to sustain the validity of an election if by any possibility this can be done. Elections should never be held void, unless clearly illegal: *State v. Freeholders*, 35 N. J. L. 269. And this principle has induced the courts to declare the provisions of election laws to be directory only, and not mandatory, in every case where this could legitimately and reasonably be done. The trend of American authority is summed up thus by the supreme court of Indiana in a recent case: "All the provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void": *Jones v. State*, 153 Ind. 440, 55 N. E. 229. The same doctrine has been expressed in numerous decisions: See, especially, *Taylor v. Taylor*, 10 Minn. 107; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183; *Fowler v. State*, 68 Tex. 30, 3 S. W. 255. In these last two cases it was pointed out that it was only those provisions of election laws relating to the time and place of holding elections, the qualifications of voters, and such others as are made essential prerequisites to the validity of an election that are mandatory. All others are directory merely. The detailed application of this general principle will be noticed in our subsequent treatment of the subject.

II. Election Districts.

a. Irregularities in Establishing.—Mere irregularities in establishing election districts or voting precincts will not, as a rule, invalidate an election which is otherwise honestly held and properly conducted. So, where a city was divided into election precincts in total disregard of the established wards of the city, the statute requiring that wards should be used as voting precincts, this fact was held not to render an election held in such wards invalid: *Ex parte White*, 33 Tex. Cr. Rep. 594, 28 S. W. 542. And where a portion of a city is not included in any voting precinct, which results in the disfranchisement of certain voters, an election will not thereby be vitiated, unless the number so disfranchised is so great that

their participation in the election would probably have affected the result: *Ex parte White*, 33 Tex. Cr. Rep. 594, 28 S. W. 542. Where election districts are illegally established by the governor, though in good faith and under color of law, an election held therein will not be invalid: *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002. So, where only two election precincts were created in a city which should have had four under the law, such failure to properly recognize voting precincts does not invalidate an election held therein: *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Bell v. Faulkner*, 84 Tex. 187, 19 S. W. 480.

A change of election districts after a proclamation for an election has been issued, and without any new proclamation, will not invalidate the election held in the new district: *Hayes v. Rogers*, 24 Kan. 143. And where a board of supervisors has power to change and consolidate election districts, the fact that the board purports to act under the wrong statute is immaterial: *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923.

While mere irregularities in forming election districts will not invalidate an election, yet where no attempt is made to comply with the law, no election districts are established, no board of registration is appointed, and the election is not conducted in accordance with the provisions of the statute, such election will be void and confer no rights upon persons claiming to be elected: *People v. Laine*, 33 Cal. 55.

III. Election Officers.

a. Defects in Appointment.

1. **In General.**—As a rule, election returns should not be rejected for any irregularity in the appointment of officers of election: *Keller v. Chapman*, 34 Cal. 635; *Pickett v. Russell*, 42 Fla. 116, 28 South. 764; *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457. An election is not void merely because of such irregularity: *Pickett v. Russell* (Fla.), 28 South. 764; *McCraw v. Harralson*, 4 Cold. 34; where it does not appear that any injurious results accrued therefrom: *Keller v. Chapman*, 34 Cal. 635; and the election was conducted fairly and honestly: *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002; and there was no fraud practiced: *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. Election officers irregularly appointed are, nevertheless, *de facto* officers: *Pickett v. Russell*, 42 Fla. 116, 28 South. 764. And their acts are valid as to the public and third persons, if legally appointed officers could have performed the same acts: *Pratt v. Breckenridge*, 23 Ky. Law Rep. 1356, 65 S. W. 136.

Failure to appoint inspectors of election at the date prescribed by law will not defeat an election held by officers appointed after the designated time: *People v. Police Commissioners*, 57 How. Pr. 445; *People v. Board of Police*, 46 Hun, 296. So the appointment

of officers six days before the time specified in the statute will not render the election held by such officers void, though the statute prescribed that a failure to comply with any provisions of the act would render the election void: *Marion v. Territory*, 1 Okla. 210, 32 Pac. 116. The reason is that the law will not tolerate the idea of a failure of duty on the part of such an executive officer defeating a popular right: *People v. Police Commissioners*, 57 How. Pr. 445.

2. **Improper Number Appointed.**—A failure to appoint the requisite number of election officers will not authorize an election to be set aside, where the irregularity is not shown to have any effect upon the result of the election: *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923; for a statutory provision requiring a specified number of election inspectors is deemed to be directory only: *State v. Stumpf*, 21 Wis. 579. Hence, the appointment of two clerks instead of four will not affect the validity of the election: *Chapman v. State*, 37 Tex. Cr. Rep. 167, 39 S. W. 113. And an election conducted by four judges instead of six is valid: *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653. Or where there are only five instead of seven officers: *Roper v. Scurlock* (Tex. Civ. App.), 69 S. W. 456. So the appointment of two additional and unauthorized ballot clerks will not vitiate an election: *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

The fact that election judges were not equally apportioned to the two leading political parties, as required, will not invalidate the election, where everything in connection with the election was fairly and honestly conducted: *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653. Such a provision is directory merely, and, in the absence of fraud, is not sufficient ground for rejecting the vote of a county or precinct: *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128.

3. **Failure to Take Oath.**—The failure of one or all of the election officers conducting an election in a given precinct to take the oath required by law will not invalidate the entire election in such district, without reference to its influence on the general result: *Whipley v. McKune*, 12 Cal. 352; *People v. Prewett*, 124 Cal. 7, 56 Pac. 619; *State v. County Commrs.*, 22 Fla. 29; *Tauner v. Deen*, 108 Ga. 95, 33 S. E. 832; *Dishon v. Smith*, 10 Iowa, 212; *Taylor v. Taylor*, 10 Minn. 107; *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653. Such irregularity cannot affect the result if the election is otherwise fair, and an honest count is had: *People v. Prewett*, 124 Cal. 7, 56 Pac. 619; *Lunsford v. Culton*, 15 Ky. Law Rep. 504, 23 S. W. 946; *Rounds v. Smart*, 71 Me. 380; *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, 24 Pac. 93; *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255; *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997; *Smith v. Howell*, 60 N. J. L. 384, 38 Atl. 180; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451. This is true, though the taking of an oath is imperatively prescribed, where the failure to take the oath is not by statute pronounced to be fatal to the election: *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653. Neither will a failure to take

the particular form of oath prescribed, the officers being otherwise sworn according to law, invalidate an election: *McCraw v. Harralson*, 4 Cold. 34.

The fact that the jurat to the oaths of judges and clerks of an election may have been informal will not invalidate the election: *Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381. Neither will a failure to sign the jurat to the oath of inspectors have such result: *State v. Board of County Canvassers*, 17 Fla. 9; nor any omission of his signature by the officer who administered the oath: *People v. Hilliard*, 29 Ill. 413.

4. **Not Appointed by Proper Authority.**—While a mere usurper or intruder cannot hold an election, when he is not a *de facto* officer: *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005; yet the irregular appointment of election officers, such as an appointment by improper authorities will not of itself vitiate an election otherwise fair and honest: *Thompson v. Ewing*, 1 Brewst. 67. A person may be illegally in office, and yet if he holds under color of title and is a *de facto* officer, his acts are valid as to third parties: *Thompson v. Ewing*, 1 Brewst. 67. And to constitute an officer *de facto* there must be some colorable election or appointment to the office: *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005. It has, therefore, been held that a village election was valid although the village council failed to designate the judges to act at such election: *State v. Bernier* (Minn.), 38 N. W. 368. So a failure to appoint election sheriffs will not invalidate an election: *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376. Neither will the fact that the election officers were appointed by the city council instead of the county court: *Fidelity Trust etc. Co. v. Mayor*, 96 Ky. 563, 29 S. W. 442. And where properly appointed election officers fail to appear, the electors present may elect other officers, and the ensuing election will be valid: *Thompson v. Ewing*, 1 Brewst. 67; *Roper v. Scurlock* (Tex. Civ. App.), 69 S. W. 456. If a qualified elector holds an election, and was recognized by the voters as the presiding officer, it will be presumed that he was duly appointed: *Roper v. Scurlock* (Tex. Civ. App.), 69 S. W. 456. In *Kirkpatrick v. Vickers*, 24 Kan. 314, the regular election officers refused to attend or act, and two election boards were elected by bystanders at different times, but both were elected before 8 o'clock in the morning, and it was held that while both were prematurely elected, yet the one last elected and last organized would be considered the legal board, where a majority of the electors present at the election participated therein, and the election held by such board was valid.

But a mere usurper cannot hold a valid election, as already pointed out, in a case where a clerk of a duly appointed registrar fraudulently got possession of the registration books, refused to surrender them, and proceeded in defiance of the demands and protest of the registrar to appoint judges of election, open polls, receive votes, canvass them and make returns: *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005.

5. **Two Sets of Officers.**—Naturally, there cannot be two sets of election officers, both of which hold elections, and both be valid. We have just noticed a Kansas case (*Kirkpatrick v. Vickers*, 24 Kan. 314) where the board of election chosen by a majority of the electors was deemed the legally appointed board to hold the election. *State v. Commissioners*, 36 Kan. 236, 13 Pac. 212, is another instructive case decided by the same court, in which two sets of officers held elections. The election was to determine the location of a county seat. The supporters of one town assembled in a building, excluded all electors unfavorable to them from participation in the organization of the poll, elected officers, and carried on an election. The remaining electors outside of the building, who greatly outnumbered those inside, being denied all participation in the first organization, proceeded to select officers from among themselves, opened a second poll in a wagon, and held an election. The court held that the majority of the voters at this precinct had a right to organize a second poll, under the circumstances, and that the returns from such second poll were entitled to be canvassed as the legal vote of such precinct.

In *Commonwealth v. County Commrs.*, 5 Rawle, 75, where two sets of officers conducted elections, both votes were deemed invalid; the first election held by one set of officers, because it was not held at the proper place, and the second held at the proper place, because not conducted by competent and legally qualified officers. While there are regularly appointed judges of election, special judges cannot be appointed and conduct a valid election: *Phillips v. Corbin*, 8 Colo. App. 346, 46 Pac. 224.

6. **Ineligible Officers.**—The fact that officers who hold an election are not qualified to do so will not usually invalidate an election, where it is otherwise fairly and honestly conducted: *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255. Whether eligible or not, they are officers *de facto*, and so far as the public are concerned, their acts are as valid as if they were officers *de jure*: *Swepston v. Barton*, 39 Ark. 549. So the fact that some of the precinct officers are ineligible is no ground for the rejection of the vote of such precinct: *Quinn v. Markoe*, 37 Minn. 439, 35 N. W. 263. Thus a minor acting as clerk of an election is an officer *de facto*, and the will of a majority of the electors will not be defeated by reason of this fact: *Bell v. Faulkner*, 84 Tex. 187, 19 S. W. 480. And though all the officers at polling places are not freeholders as required by law, yet if they were appointed regularly, and acted fairly, and no wrong was done, the vote should not be rejected by reason of such irregularity: *Collins v. Huff*, 63 Ga. 207. The same court, however, in the later case of *Walker v. Sanford*, 78 Ga. 165, 1 S. E. 424, declared an election invalid where one of the officers lacked the requisite statutory qualifications. But it should be noted that this election was not held at the proper place, which was a controlling circumstance as well, and the statute appears to have been mandatory that to be valid an election must be held at

the proper time and place by persons qualified to hold them. Otherwise, the mere fact that an ineligible officer acted should not of itself be deemed a sufficient irregularity to avoid an election.

7. **Candidate Acting as Officer.**—The fact that a candidate acted as one of the election officers will not invalidate the entire election: *Sweepston v. Barton*, 39 Ark. 549. Hence, where there are two lawful inspectors, the third being a candidate, the two may act without the third, and this state of facts will not render the proceedings, or the election, invalid: *People v. McManus*, 34 Barb. 620, 22 How. Pr. 25. And the fact that a candidate acted as an officer for a short time will not render the election void: *Boileau's Case*, 2 Pars. Eq. Cas. 503. Or even if he acts as an officer during the entire election: *People v. Avery*, 102 Mich. 572, 61 N. W. 4. And where the regular judges of election were illiterate, and could not read or write the English language, the fact that one of the candidates acted as clerk will not invalidate the election: *State v. Bernier* (Minn.), 38 N. W. 368. If one of the judges of election is a son in law of one of the candidates, the election of such candidate is not thereby rendered void: *Hardin v. Colquitt*, 63 Ga. 588.

There is some intimation in the cases that if one of the officers of election is himself a candidate for office, the election might be invalid as to him: *Sweepston v. Barton*, 39 Ark. 549; *People v. McManus*, 34 Barb. 620, 22 How. Pr. 25; *Boileau's Case*, 2 Pars. Eq. Cas. 503. His election would clearly be invalid if the statute so prescribed: See *People v. Avery*, 102 Mich. 572, 61 N. W. 4. But the tendency is clearly noticeable to hold that no irregularity in conducting an election will invalidate it, if it is otherwise fairly and honestly conducted, and if the result would not have been different if proper and eligible election officers had acted. And this doctrine would appear to be applicable in the case of the election of a candidate who for some apparently valid reason has acted as one of the election officers.

b. **Absence of Election Officers.**—The temporary absence of one of the election officers from the polls a part of the day will not invalidate an election: *Thompson v. Ewing*, 1 Brewst. 67. So the fact that one officer left before the votes were all counted will not invalidate a return made by the other officers: *Tanner v. Deen*, 108 Ga. 95, 33 S. E. 832. The absence of a part of the officers during election hours will not invalidate an election: *Major v. Barker*, 99 Ky. 305, 35 S. W. 543. The absence of one officer a short time from the polls, during which no vote was cast, does not vitiate the election: *State v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545. Neither is it vitiated if votes are received during such time: *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079. The absence of some of the election officers during voting hours does not vitiate the election, where no elector was hindered or prevented from voting by reason thereof: *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867. In the case of voluntary absence from the polls, it is the policy of the

law to punish the officer and not the voters: *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867.

The law does not require the presence of all the election officers during all the time the voting is in progress: *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079. So where one of the officers is absent when the polls open, and a substitute is appointed who retires when the absent officer arrives, the election is not thereby invalidated: *Lee v. State*, 49 Ala. 43. And see *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451. And where an officer is absent by reason of illness, and the other officers appoint another to fill the vacancy, such irregularity does not affect the validity of the election, if the result is not thereby changed: *People v. Lodi High School Dist.*, 124 Cal. 694, 57 Pac. 660.

In Georgia it appears to be mandatory that a justice of the peace should preside at a constable's election, and if such officer acts but a portion of the day, the election is rendered illegal: *Franklin v. Kaufman*, 65 Ga. 260. So it has been held that an election held by two commissioners instead of by three as the law requires, will invalidate the entire election: *United States v. Carbery*, 2 Cranch C. C. 358, Fed. Cas. No. 14,720. And an election to vote aid to a railroad, held as an ordinary town meeting, presided over by one moderator only, with only one clerk, is void, where the law requires such an election to be held by three judges and two clerks, as in general elections: *Chicago etc. R. R. Co. v. Mallory*, 101 Ill. 583.

c. Misconduct of Election Officers.

1. *Mere Irregularities.*—Mere irregularities on the part of election officers, as a rule, furnish no reason for rejecting an entire election returns: *Jones v. Caldwell*, 21 Kan. 186. A fair election and an honest return are paramount in importance to minor requirements which prescribe the formal steps to reach that end, and, therefore, courts will ignore such innocent irregularities of election officers as are free from fraud, and have not interfered with a full and fair expression of the voter's will: *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101. Hence it has been held that irregularities of officers in preparing and filing nomination papers will not follow the ballots into the hands of the voters so as to invalidate an election: *Blackmer v. Hildreth* (Mass.), 63 N. E. 14. So a failure of election clerks to require some voters to give their names and addresses or to announce the same, and failure to instruct the voter how to mark his ballot, or to write opposite the voter's name the number of his ballot, and a failure in some instances to announce the name of the voter and the number of his ballot, and similar irregularities, which were the result of ignorance or inadvertence and not of any fraud or willful wrong, will not vitiate the election, although the acts omitted were prescribed by statute: *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30. Provisions such as these are merely directory so far as third persons are concerned, and a failure to observe merely directory provisions will not invalidate an otherwise fair and honest

election: *Fowler v. State*, 68 Tex. 30, 3 S. W. 255. The fact that a clerk takes the place of an absent inspector for a time will not vitiate an election: *Thompson v. Ewing*, 1 Brewst. 67. Neither will the conduct of an election judge in instructing voters how they could vote the straight ticket of his party have such effect, though it is in violation of law, and very reprehensible: *Pettit v. Yewell* (Ky.), 68 S. W. 1075. Any mere failure to properly comply with the law will not vitiate an otherwise valid election: *In re Pine Hill*, 33 N. Y. Supp. 181, 67 N. Y. St. Rep. 15. This is true as to the directory provisions of a statute. An honest or mistaken disregard of directory provisions, not resulting in manifest fraud, will not justify the rejection of the entire vote of a precinct; but a neglect of directory provisions designed to prevent fraudulent voting, followed by actual fraud of such a character as to throw a doubt on the result of the election, is ground for rejecting the entire vote of a precinct, where there is no means of purging the poll: *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183. A mere mistake in appointing too many ballot clerks will not avoid an election: *Dial v. Hollandsworth*, 39 W. Va. 1, 19 S. E. 557.

2. **Willful Misconduct.**—Even willful misconduct on the part of election officers will not necessarily invalidate an election. Misconduct which does not change the result will be disregarded: *Minear v. Tucker County Court*, 39 W. Va. 627, 20 S. E. 659. And if the actual legal vote cast at an election can be determined, effect must be given to such vote notwithstanding misconduct on the part of officers: *Lucky v. Police Jury*, 46 La. Ann. 679, 15 South. 89. Even criminal violations of election statutes at a precinct will not invalidate the precinct vote, where no candidate participates in it, the acts do not make or lose votes for any candidate, or destroy the secrecy of the ballot, or cast uncertainty on the result of the election, and no elector voting at such precinct participates in such acts, or is prevented from voting or properly marking his ballot, and no disqualified person is allowed to vote: *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128; *Gass v. State*, 34 Ind. 425. So the intoxication of one officer, producing no effect upon the election, is not sufficient cause for rejecting a precinct vote: *Thompson v. Ewing*, 1 Brewst. 67. And where all the election officers drink some, but not sufficient to affect them in the discharge of their duties, the vote is valid: *Bailey v. Hurst* (Ky.), 68 S. W. 867. The use of whisky, coupled with other violations of the election law, which disregard the secrecy of voting by ballot will invalidate a precinct vote; *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149.

Even honest voters may be deprived of their votes through the criminal conduct of unworthy men: *Thompson v. Ewing*, 1 Brewst. 67. The misconduct of election officers may, therefore, vitiate an entire election or the vote of an entire precinct if their conduct is of a certain character. A disregard of mandatory provision of an election statute will have such a result: *Russell v. McDowell*, 83

Cal. 70, 23 Pac. 183. As will also a violation of such directory provisions as were designed to prevent fraudulent voting, followed by such actual fraud as throws suspicion on the result, without any means of purging the poll. This was so held in a case where precinct officers disregarded the provisions requiring the residence of voters in incorporated towns to be announced and recorded on the poll list, where such misconduct was coupled with proof that many more persons voted than there were qualified voters actually resident on each lot in the precinct on the day of election and for thirty days previous: *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183. Where fraud has been perpetrated, and the irregularities of officers have been so gross as to forbid a reliance upon anything done, the vote will be rejected, or strict proof of a legal election will be required: *Thompson v. Ewing*, 1 Brewst. 67. Even great irregularity has been held not to vitiate an election, where no fraud was committed or attempted, no illegal vote was polled, and no legal vote rejected: *Morris v. Vanlaningham*, 11 Kan. 269. The misconduct must have some influence on the probable result in order to invalidate an election. Hence, where officers knowingly receive ballots from illegal voters, also a large number of ballots which had been shown after being marked, and had allowed and instructed third persons to enter voting booths with electors, such misconduct will vitiate the vote of the election precinct: *Attorney General v. McQuade*, 94 Mich. 439, 53 N. W. 944. So where judges electioneered with voters in the booths, and a large number of ballots were marked by one judge directly contrary to the expressed wish of the voters, there is such fraud as will invalidate the election: *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680. Fraudulent conduct which changes the result of the election will render it void: *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218, where it is the duty of a county clerk to properly prepare ballots, and he so prepares them as to confuse and mislead voters, the election will be void as to such county clerk who was a candidate for re-election, although it was held not to be void as to other successful candidates, who were not responsible for the irregularities: *Creech v. Davis*, 21 Ky. Law Rep. 325, 51 S. W. 428.

IV. Registration of Voters.

a. *Necessity of Registration.*—Where an election statute requires registration before an election, such provision is usually deemed to be mandatory and imperative, and an election without a registration of voters is void: *Nefzger v. Davenport* etc. Ry. Co., 36 Iowa, 642; *State v. Albin*, 44 Mo. 346; *People v. Laine*, 33 Cal. 55; *People v. Kopplekom*, 16 Mich. 342; *State v. Stumpf*, 23 Wis. 630; *Pitkin v. McNair*, 56 Barb. 75. But where the legislature has failed to enact a registration law, though under the constitution it should do so, registration is unnecessary to the validity of an election, since there is no law applicable to the situation: *Stallcup v. Ta-*

coma, 13 Wash. 141, 52 Am. St. Rep. 25, 42 Pac. 541. And if a registry law is repealed prior to an election, a valid election may be had without registration: *Detroit etc. R. R. Co. v. Bearss*, 39 Ind. 598.

If a special and new registration is required for each election, an election held without such re-registration is invalid: *Pitkin v. McNair*, 56 Barb. 75; *State v. Albin*, 44 Mo. 346. But where no authority is given to order a new registration, an election must be held under the old registration, and the result must be determined by such register and not by the new one: *Smith v. Wilmington*, 98 N. C. 343, 4 S. E. 489.

b. Irregularities in Registration.

1. **In General.**—Mere irregularities in registration will not usually invalidate an election. Irregularity of registration and utter absence of registration are radically different things: *Tullos v. Lane*, 45 La. Ann. 333, 12 South. 508. Where a noncompliance with the provisions of the registry laws are not essential to the purity of elections, voters should not be deprived of their votes: *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997. Even the nonobservance of constitutional or statutory provisions, where it amounts to a mere irregularity and does not affect the result, will not invalidate an election: *State v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545; for it is not every irregularity in the registration of voters that will invalidate an election, unless it is shown that it would have changed the result: *Barnes v. Board of Supervisors*, 51 Miss. 305. But where the irregularity consists in a failure to provide a board of registration, so that there was no opportunity to register, the election is void if carried by such votes, since an unregistered voter cannot vote: *People v. Kopplekom*, 16 Mich. 342.

2. **Registration by Wrong Officers.**—A registration list prepared by wrong officers will not vitiate an election, where the list was accepted and used at the election without any question: *State v. Weed*, 60 Conn. 18, 22 Atl. 443. So registration carried on in good faith by persons having no legal authority so to do will not render the votes cast by persons registered illegal, where there is no fraud or actual injury resulting: *Tullos v. Lane*, 45 La. Ann. 333, 12 South. 508. This case points out that voters may accept registers de facto, and need not inquire into their qualifications de jure.

3. **Refusal to Register Voters.**—Opportunity must be given to all persons entitled to become qualified voters to register, and if this opportunity is denied either purposely or by accident, it will vitiate the election, certainly if such denial should materially affect the result: *McDowell v. Massachusetts etc. Construction Co.*, 96 N. C. 514, 2 S. E. 351. To hold otherwise, it was pointed out in *Zeiler v. Chapman*, 54 Mo. 502, "would be to submit the result of all elections to the officers of registration, who could attend at such precincts as they pleased, and refuse to attend to such as they

thought unfavorable to their views, and a small minority of the electors could in this way elect.”

4. **Time for Registration.**—A disregard of the provisions of the registry law as to the time of registration will not necessarily invalidate an election held under such registration, unless the violation of the law is flagrant. It is, therefore, held that the failure of a registry agent to keep office hours as required by statute will not usually invalidate an election: *Stinson v. Sweeney*, 17 Nev. 309, 30 Pac. 997. Also, a failure to keep the registration books open on the Saturday before the election, during the whole of the prescribed time, does not vitiate the election when no one was denied the right of examining the books: *State v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545. But where registration was closed more than a month too soon, and many were thus prevented from voting, the election was declared void: *Stephens v. Mayor*, 84 Ga. 630, 11 S. E. 150.

The fact that there is not sufficient time before an election for a registration of voters will not vitiate the election where there is no provision for a separate registration for such election: *McNeely v. Morgantown*, 125 N. C. 375, 34 S. E. 510. And, although registration is usually required, yet when a statute limits the time for holding an election to a less number of days than is required for the registration of voters, and no registration is had for this reason, the votes cast at such election will not on that account be illegal: *State v. Piper*, 17 Neb. 614, 24 N. W. 204. This case very pertinently observes that “the registration law is to be used as a shield and not as a sword; as a protection against illegal votes, and not as a means of disfranchising the people of a whole county or of any of its subdivisions.” See, also, *Swain v. McRae*, 80 N. C. 111, where a failure to have a new registration was held not to vitiate an election, under somewhat similar circumstances.

5. **Place of Registration.**—The fact that registration was not had at precisely the place stated in the notice to voters will not vitiate the registration or the election held under it. This rule was applied in *Newsom v. Earnheart*, 86 N. C. 391, where a registrar gave notice that the registration of voters would take place at his residence, but kept the books and actually registered the names at his store some three hundred yards distant, he having left word at the house for persons applying there to come to the store.

6. **Failure to Properly Prepare Register.**—Provisions of an election law as to the preparation of a register are usually considered directory merely, not jurisdictional, and a failure to observe such provisions will not so invalidate the proceedings of a board of registry as to render votes cast at an election illegal and void: *People v. Wilson*, 62 N. Y. 186; *State v. Baker*, 38 Wis. 71. So that the fact that registers were not arranged alphabetically, certified, filed or posted as required by law, will not invalidate

an election: *State v. Baker*, 38 Wis. 71. The preparation of an alphabetical list is not necessary to the validity of an election, the statute being in this respect merely directory: *Mussey v. White*, 3 Me. 290. But in *People v. Wilson*, 3 Hun, 437, under a statute requiring the register to be made up from certain poll lists, and which declared that no vote should be received unless the name of the voter was on the registry properly made up, it was held that the manner of preparing the register was mandatory, and if not made as required by statute, the entire vote depending on such register must be rejected. And it is held that though a voter has registered, yet if his name does not appear on the great register and on the poll list, he cannot vote, although the failure of his name to appear on the list was due to accident: *Webster v. Byrnes*, 34 Cal. 273. Such an irregularity would not affect an entire election, however.

c. Unconstitutional Registration Law.—Where a registration act is in conflict with the constitution, and the statutory regulations are followed instead of those of the constitution, the election is nevertheless valid: *Hunter v. Senn*, 61 S. C. 44, 39 S. E. 235.

V. Nomination of Candidates.

a. Irregularities.—It would seem that mere irregularities in the nomination of candidates for office, and in placing their names on the official ballot, should have no effect on the election held. But in *Priece v. Lush*, 10 Mont. 61, 24 Pac. 749, the provisions of a statute relating to nominations and preparation of ballots were held to be mandatory, so that a failure to observe them would invalidate an election. In this case it appeared that the candidate was not nominated by an organized convention of delegates from any political party, the certificate of nomination did not state the name or business of the candidate, or the name of the party or principal represented, and was not signed as required by law, neither did it state facts to show that a vacancy was to be filled, though this appears to have been the fact. And the court held that the candidate acquired no right to have his name on the official ballot, and his election would be void. This decision was subsequently modified in the later case of *Stackpole v. Hallahan*, 16 Mont. 40, 40 Pac. 80, where, although the statute was not strictly conformed with in reference to nominations and in the preparation of certificates of nomination, yet no objection to these defects having been made prior to the election, and the election having been honestly and fairly conducted, it was held that the provisions of the statute would be considered as directory only, and that the election should stand. This last case we believe to enunciate the correct doctrine, clearly in line with the whole tendency of American authority.

In connection with nominations, mention should be made of the placing of names on the official ballot in compliance with statutory provisions. And it is generally held that error or irregularity in

this particular will not invalidate an election. Thus, error in printing the names of candidates under the wrong party title is held not to invalidate the ballots so printed and voted: *Allen v. Glynn*, 17 Colo. 338, 31 Am. St. Rep. 304, 29 Pac. 670. So under the Missouri ballot law, an error of the county clerk, in printing names of additional candidates on official ballots, will not nullify the election at which those ballots are used: *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101. But where a county clerk, who is also a candidate for re-election, improperly prepares ballots so as to confuse and mislead voters, his own election may be invalidated by such misconduct, though the election will not be void as to other successful candidates: *Creech v. Davis*, 21 Ky. Law Rep. 325, 51 S. W. 428.

VI. Calling or Ordering Election.

a. **Calling Election in General.**—It was early held in California that irregularities in bringing about an election are to be disregarded, if there is no fraud and no one is prevented from voting: *People v. Brenham*, 3 Cal. 477. But this decision has been modified by subsequent decisions which will be noticed more specifically under calling special elections and giving of notice. The general rule appears to be that an election should be called as provided by statute, by the proper authority and in a designated manner: *Stephens v. People*, 89 Ill. 337. But if it is called by the proper officers, and the mode pursued is proper, mere irregularities in connection with the proper exercise of the power to call an election will not invalidate it. Thus, a mere irregularity in the description of territory contained in a published notice of election which is different from the description contained in the order for election is not such a variance as will render the election void: *Kirkland v. Guinn* (Tex. Civ. App.), 62 S. W. 1101. So the failure of a village council to make or file or publish the financial statement of the village prior to an annual election will not invalidate the election: *State v. Bernier* (Minn.), 38 N. W. 368. And where the statute requires that in submitting the question of making a loan to a vote of the citizens, the words used should be "For the loan," and "Against the loan," the fact that the board of supervisors used instead the words "yes" and "no" is a mere irregularity which will not defeat the election: *Thomas v. Kent Circuit Judge*, 116 Mich. 106, 74 N. W. 381; for the fact that the submission of a proposition to a vote of the electors is not stated in the statutory language prescribed will not invalidate the vote: *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536.

b. Calling Special Election.

1. **Call by Wrong Officers.**—Where an election is special, and the statute prescribes the authority which must call the election, the time and place of holding the election can be fixed only by the authorities designated in the statute. So where the governor or the board of supervisors have authority to call a special election,

one called by the sheriff will be invalid: *People v. Palmer*, 91 Mich. 283, 51 N. W. 999. In this respect general elections, the time and place of holding which are fixed by law, differ from special elections, in that a failure to properly call such elections will not invalidate them. But in special elections, where the law fixes no time or place of holding them, leaving that to be named by some authority named in the statute, it is essential to the validity of such elections that they be called, and the time and place thereof fixed, by the very agency designated by law, and none other: *Stephens v. People*, 89 Ill. 337. And see *Adsit v. Secretary of State*, 84 Mich. 420, 48 N. W. 31; *People v. Highland Park*, 88 Mich. 653, 50 N. W. 660; *People v. Porter*, 6 Cal. 26; *People v. Martin*, 12 Cal. 409. So where a mayor and city council are authorized to call a special election to submit the question of incorporation to the voters, the mayor alone has no power to act: *Stephens v. People*, 89 Ill. 337. And where a town clerk is the proper officer to call an election to vote aid to a railroad, an election called by town supervisors will be void: *Force v. Batavia*, 61 Ill. 99. And see *Clark v. Board of Supervisors*, 27 Ill. 305.

2. **Election to Fill Vacancy.**—Where a vacancy in an office does not occur long enough before a general election to enable the steps required by statute, such as giving notice, and so forth, to be taken, no election can legally be held at such time for the purpose of filling the vacancy: *Beal v. Ray*, 17 Ind. 554. To make any election legal there must be a time fixed for holding it. So where no special day is prescribed for filling a vacancy in an office, no election to fill such vacancy can be legally held where it is not called in the proper manner by the proper officers: *Toney v. Harris*, 85 Ky. 453, 3 S. W. 614. An election to fill a vacancy cannot be held before the office is vacant. Hence, where an officer resigns, to take effect on a future day, an election to fill the office before that day is void: *Clemmens v. Cato*, 4 Sneed, 291.

3. **Before Statute Goes into Effect.**—An election held under the provisions of an act before such act goes into effect, is void: *State v. Little Rock etc. Ry. Co.*, 31 Ark. 701. And this is true though one section of the act provides for an election on a named day, if that day is prior to the time when the law was to go into effect: *People v. Johnston*, 6 Cal. 673.

c. Petitioning for Election.

1. **When Petition Necessary.**—A petition is sometimes necessary, when made so by statute, to confer jurisdiction to call an election for a special purpose. When thus made necessary the required number of petitioners must sign the petition: *Hoxie v. Scott*, 45 Neb. 199, 63 N. W. 387. So if only one-half of the resident taxpayers sign a petition for an election, the election is void, where the statute requires that a majority of the taxpayers shall join in the petition: *Slack v. Blackburn*, 64 Iowa, 373, 20 N. W. 478. Where

a statute prescribes that upon a petition signed by a certain number of voters who are taxpayers, the county judge shall make an order "at the next regular term of his court" for an election, an election held under an order made by the county judge at the same term of court at which the petition was filed is void: *Doores v. Varnon*, 94 Ky. 507, 22 S. W. 852.

2. **Contents of Petition.**—The petition presented should be signed by the taxpayers who petition. So, where two or more petitions identical in language are circulated and signed, and to make the required number of names the signatures on one or more petitions are cut off and pasted on to a single petition, which is presented, the signatures thus attached cannot be counted in making up the requisite number of names, and if this copy of the petition is not actually signed by the necessary number of petitioners, no jurisdiction is conferred to call an election: *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591; *Fox v. Board of Supervisors*, 49 Cal. 563.

A petition for an election to vote bonds to an improvement company must name the company which is to be the recipient of the proposed subscription and the amount of bonds to be voted. And where the petition and the notice for the election fails to state these facts, the issue of bonds voted for at such election are unauthorized and void: *People's Nat. Bank v. Pomona*, 48 Kan. 55, 28 Pac. 1089. And see *Detroit etc. R. R. Co. v. Bearss*, 39 Ind. 598.

That a petition calls the signers "voters and taxpayers," while the act required a petition by "resident taxpayers," is immaterial, and will not invalidate the election: *Claybrook v. Commissioners*, 114 N. C. 453, 19 S. E. 593. And the alteration of a petition on the morning of the election, by striking out a clause that bonds, which were to be voted for in aid of a railroad company, were to be delivered as fast as the work on the road should progress, and thus leaving the statutory condition to apply, will not invalidate the election, as the alteration worked no injury to anyone concerned: *Illinois etc. Ry. Co. v. Town of Barnett*, 85 Ill. 313. The failure to publish the names of all the signers of a petition asking for a special tax will not invalidate the special tax voted for at the election held for that purpose: *Duperier v. Viator*, 35 La. Ann. 957.

d. Ordering Election.

1. **Necessity of Order.**—Ordering and calling an election appear to be the same thing, sometimes one term being used and sometimes the other. And the rule is the same as applied to special elections; they must be ordered by the proper authorities or they will be invalid. Hence, where a city council and the mayor fail to order an election to fill a vacancy, votes cast at a city election to fill such vacancy are nugatory: *State v. Buck*, 13 Neb. 273, 13 N. W. 406. And where a special election to fill a vacancy has not been ordered, as required, the fact that a person was voted for at a general election will not give him the right to the office: *People v. Witherell*, 14 Mich. 48. So, where an election is called by a town clerk, when the town coun-

cil has not ordered the election, it will be void: *Jacksonville etc. R. R. Co. v. Virden*, 104 Ill. 339.

2. **Irregularities in Passing Order.**—The validity of an election will not depend upon the proper keeping of a record showing that the election was ordered. So, where an election has been legally called and held, the absence of a record showing that it was ordered will not necessarily invalidate it: *Jacksonville etc. R. R. Co. v. Virden*, 104 Ill. 339. And the fact that the order providing for an election was passed by less than a quorum of the board authorized to pass such order will not vitiate an election held in pursuance thereof: *Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381. Where an election may be ordered in counties having no city containing a population of more than a certain number of inhabitants, the election cannot be attacked by showing that the county contained a city of a larger size. The determination of the tribunal empowered to order the election is conclusive until set aside by a direct proceeding for that purpose: *State v. Mackin*, 51 Mo. App. 299.

3. **Contents of Order.**—An order for an election passed by a city council need not fix the date for the election, if ten days' notice is given prior to the election: *Janks v. State*, 29 Tex. App. 233, 15 S. W. 815. But where an order calling an election substantially departs from the requirements of a statute and requires the polls to be open one hour less than prescribed, the defect is fatal: *Hutchinson v. Rowan*, 57 N. J. L. 530, 31 Atl. 224. It should be noticed, however, that the proceedings in this case were such that the irregularity of the order could be reviewed without reference to the result of the election. Where an order for an election is so vague that it is calculated to mislead a voter as to whether the question to be voted on is the erection of a new township, or the division of an old one, the election will be declared invalid and a new one ordered: *Ryon Township*, 1 Walk. 137. And an election was held to be void for uncertainty in *McElroy v. State*, 39 Tex. Cr. Rep. 529, 47 S. W. 359, where the order for the election was in the disjunctive, and the petition asking for the election was stated in the conjunctive.

e. **Necessity of Writ of Election.**—The failure to issue writs for holding election to the presiding officers of the various election districts will not invalidate the election or render it void: *Ex parte Williams*, 35 Tex. Cr. Rep. 75, 31 S. W. 653; *Ex parte Schilling*, 38 Tex. Cr. Rep. 287, 42 S. W. 553. Especially is this true where the law fixes the time and place of holding the election, and the electors knew of it: *Sterritt v. McAdams*, 99 Ky. 37, 34 S. W. 903. But where special elections to fill vacancies depend wholly upon statute, and warrants are required to be issued by county commissioners to the municipal officers of the several towns of the registry district, to fill the vacancy, without such warrants, the municipal officers of the towns cannot legally call meetings for such a purpose: *Rose v. Knox County Commrs.*, 50 Me. 243.

VII. Holding Election.

a. In General.—There is no inherent right in the people to hold an election. It can only be held by virtue of some constitutional provision or legal enactment, either expressly or by direct implication authorizing that particular election: *Sawyer v. Haydon*, 1 Nev. 75. An election can only be held when authorized by law: *State v. Collins*, 2 Nev. 351; for all the efficacy given to the act of casting a ballot is derived from the law-making power and through legislative enactment; and the legislature must provide for and regulate the conduct of an election, or there can be none: *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754. So, where the law makes no provision for an election, an attempt to hold an election would be wholly void and of no effect, notwithstanding there was an omission to hold an election in the year required: *State v. Jenkins*, 43 Mo. 261. Where the law provides that an election for certain offices shall be held by the sheriff, either he or a sworn deputy must hold it; otherwise it will be void: *State v. McEntyre*, 25 N. C. (3 Ired.) 171.

b. Place of Holding Election.—An election for officers in one state cannot be held in another state: *School Directors v. National School etc. Co.*, 53 Ill. App. 254. But a polling place of one district may be fixed outside the boundary line of that district, and the vote of such district is not rendered invalid by reason of such fact: *People v. Carson*, 155 N. Y. 491, 50 N. E. 292. And although the constitution provides that all electors shall vote in the election precinct of their residence, this does not prevent a valid precinct election being actually held in another precinct: *Roper v. Scurlock* (Tex. Civ. App.), 69 S. W. 456. But where the polls of a township are not authorized to be held in a city, holding them in such city will render the vote of the township illegal and void: *People v. Knight*, 13 Mich. 424.

The place of holding an election may be changed, if proper notice is published, even after notice of the election has been given: *Chicago v. People*, 80 Ill. 496. And where the place of holding town elections is changed by statute, an election held at such place is valid, although the electors had not changed the polling place, as provided by a previous act: *State v. Waterbury*, 79 Wis. 207, 48 N. W. 424.

c. Time of Holding Election.

1. In General.—Usually, an election held at a time other than that fixed by the legislature is void: *State v. Dombaugh*, 20 Ohio St. 167. So, where the statute requires that a notice of eight days shall be given before an election, if a vacancy occurs in an office less than eight days before a general election, the vacancy cannot be filled at such general election: *Loran v. Webb*, 82 Ky. 246. A municipal corporation which has not reorganized under the general law may hold its election at the time prescribed by the act under which it was organized: *People v. Keeling*, 4 Colo. 129.

It seems, however, that an election may be valid, even though held on the wrong day, if this occurred by a pure mistake, and without objection, and the mistake was not discovered until after election, which was otherwise fairly and honestly conducted and was participated in by a large majority of the qualified electors: *State v. Tolan*, 33 N. J. L. 195. Where an election is to be held on the first Monday in May every two years, the fact that such a day came two days earlier in the month than it did two years before and therefore lacked two days of being two years from the date of the previous election will not invalidate an election on the ground that it is not held at the time required by law: *McNeely v. Morgantown*, 125 N. C. 375, 34 S. E. 510.

An election held on the day fixed by law is good though the manner of calling and holding it may have been informal: *Smith v. Crutcher*, 92 Ky. 586, 18 S. W. 521.

2. **Within Prescribed Time After Petition.**—Statutes providing that elections shall be ordered when petitioned for for certain purposes, usually require that the election shall be held within a certain number of days after the receipt of the petition. Such direction is generally considered mandatory, and if the election is not held within the time stated in the statute, it will be void. Hence, it is held that an election for the relocation of a county seat must be held within fifty days after the presentation of the petition therefor, or it is void: *Gossard v. Vaught*, 10 Kan. 162; *State v. Washoe County*, 6 Nev. 104. So an election held more than forty days after the receipt of a petition by the proper authorities will invalidate an election: *State v. Ruark*, 34 Mo. App. 325. But where two elections are necessary to determine a question which electors have petitioned shall be submitted to them, it is not essential that the last election should be held within fifty days of the presentation of the petition therefor: *Conley v. Fleming*, 14 Kan. 381. And where a statute provides that an election petitioned for shall not be held within sixty days of a municipal or state election, the former election will not be rendered invalid by reason of the fact that a special municipal election occurred within sixty days afterward, when such municipal election was not, and could not have been, contemplated or anticipated until after the date of the first election: *State v. Ruark*, 34 Mo. App. 325.

3. **Election at Adjourned Meeting.**—Where permitted by legislative authority, an election may be adjourned to a later day. Thus the majority of the voters at a town meeting have an implied right to adjourn the meeting to another time and place, if fairly done and for no improper purpose: *Stone v. Small*, 54 Vt. 498. But the majority cannot adjourn a meeting to elect officers without day, in fraud of the law and the minority; and if a legal minority, immediately following such adjournment, reorganizes the meeting, and elects officers, the election is valid: *Stone v. Small*, 54 Vt. 498. Where adjournment of one meeting is allowed, this second meeting

cannot be adjourned and officers elected at such adjourned meeting: Supplement, 23 Pick. 547. Where a few voters meet and adjourn an election, and later, but within the time required by law, a sufficient number of qualified voters organize and hold the election, such election is valid, notwithstanding the earlier adjournment: *People v. Brewer*, 20 Ill. 474. A school board may adjourn a regular election, and hold a valid election at the subsequent date: *Carter v. McFarland*, 75 Iowa, 196, 39 N. W. 268.

VIII. Notice of Election.

a. Necessity.

1. **In General.**—The calling of an election contemplates the giving of some notice: *State v. Young*, 4 Iowa, 561. Indeed, electors must have some notice that an election is to be held, or there is no opportunity given for them to express their will. But it is not always essential that the particular form of giving notice should be followed. It is essential to the validity of a popular election that the time at which the same is to be held should be designated in advance: *Kenfield v. Irwin*, 52 Cal. 164. Where an election is to be held after proclamation or notice for that purpose, the election will fail if no such proclamation or notice is given. "Where, however," says Judge Cooley, "both the time and the place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer, whose duty it is to give notice of the election, has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice": Cooley's Constitutional Limitations, 759. This is undoubtedly the correct rule, and special notice need not be given, or at least the validity of an election is not affected if no notice is given, unless the time or place of the election is not fixed by law, and notice is essential for that purpose: See *Wilson v. Brown*, 22 Ky. Law Rep. 708, 58 S. W. 595. An election will not be invalidated by the omission of some officer to give notice thereof, when such election has been duly ordered and held: *Dishon v. Smith*, 10 Iowa, 212. But if no time is prescribed for an election, and the statute requires the governor to issue a proclamation of election to fill certain offices, the provision is mandatory, and an essential prerequisite to all such elections. The object of the proclamation is to give notice to the electors that such an election will be held, for without such proclamation the electors have no means of knowing when an election is to take place: *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People v. Porter*, 6 Cal. 26; *People v. Martin*, 12 Cal. 409; *Kenfield v. Irwin*, 52 Cal. 164. So an election is void where no notice of it is given, the voters were in ignorance that the office was to be filled, and only ninety-four persons out of a total voting popula-

tion of about twelve thousand voted: *Wilson v. Brown*, 22 Ky. Law Rep. 708, 58 S. W. 395.

2. **Where no Notice Given.**—Under the doctrine already stated, the fact that no notice is given of an election will not necessarily invalidate it. If the law fixes the time and place of holding an election, the fact that it is held without any previous special notice will not invalidate it: *Smith v. Crutcher*, 92 Ky. 586, 18 S. W. 521. The law itself is in such cases sufficient notice that an election is to be held: *State v. Gorin*, 6 Nev. 276. Where no special notice is required by law, none need be given to render an election valid: *Lafayette v. State*, 69 Ind. 218. And mere neglect to give statutory notice is not conclusive of the invalidity of an election: *State v. Taylor*, 15 Ohio St. 137; *State v. Jones*, 19 Ind. 356, 81 Am. Dec. 403; *State v. Goetze*, 22 Wis. 363.

Where the election for township officers is to be held on the same day as the general election, the failure to give the statutory notice will not invalidate the election of such officers: *Jones v. Gridley*, 20 Kan. 584.

Failure to give notice for the required number of days will not invalidate an election where there was full knowledge of such election and a full vote: *State v. Carroll* (R. I.), 24 Atl. 106. But where there is a total failure to give notice of an election to fill a vacancy, and by reason of such misfeasance the great body of the electors are misled, and have no notice, either official or in fact, of the election, and only a small number of electors vote, the election is invalid: *Foster v. Scarff*, 15 Ohio St. 532.

3. **Where Time of Election is Fixed.**—As already pointed out, where the time and place of election are fixed by law, the failure to give a statutory or other notice will not invalidate an election: See, further, *People v. Brenham*, 3 Cal. 477; *Carson v. McPhetridge*, 15 Ind. 327. The statutory provision fixing the time of the election is of itself sufficient notice, and no other notice is essential to the validity of the election: *Berry v. McCollough*, 94 Ky. 247, 22 S. W. 78; *Augusta v. Maysville etc. R. R. Co.*, 97 Ky. 145, 30 S. W. 1.

b. Notice of Special Elections.

1. **Necessity.**—The time for holding a special election is not usually prescribed by law, but depends upon the giving of some notice thereof by proper authorities. Notice is, therefore, generally essential to the validity of a special election: *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376. The cases recognize this essential difference and distinction between general and special elections. In California it has been rightly held that the proclamation of the governor, required by statute, is necessary to the validity of a special election: *People v. Porter*, 6 Cal. 26; *People v. Templeton*, 12 Cal. 394; *People v. Rosborough*, 14 Cal. 180. Where a statute renders a proclamation necessary to the holding of an election, it must be given: *Jones v. State*, 1 Kan. 273. And see *Jacksonville etc. R.*

R. Co. v. Virden, 104 Ill. 339. In *Barry v. Lauck*, 5 Cold. 588, it was held that a total failure in one county to give the notice requisite to the validity of a special election, and which operates as a practical disfranchisement of the legal voters of the entire county, was such a substantial and material failure of the electoral franchise as to render the election a nullity in the entire district.

There appears to be some conflict of judicial opinion as to whether notice of a special election was required when it was held at the same time as a general election. In *People v. Thompson*, 67 Cal. 627, 9 Pac. 833, it was held that notice was required, although the special election was held at the same time as a general election. To the same effect is *State v. Martin*, 83 Mo. App. 55. An opposite rule seems to have been announced in *Attorney General v. Trombly*, 89 Mich. 50, 50 N. W. 744. And see, especially, the later discussion on the necessity of notice of an election to fill a vacancy.

The necessity for giving notice comes from the statute, and hence when that is so changed as to provide for an election within a time so short that the notice previously required is impossible, no notice need be given: *Powell v. Jackson Common Council*, 51 Mich. 129, 16 N. W. 369. So, where two elections are necessary to determine the question of a county seat, the failure of the sheriff to give notice of the second election, does not invalidate such election: *Light v. State*, 14 Kan. 489.

2. Failure to Give Full Statutory Notice.—A mere failure to give the full statutory notice of a special election will not necessarily invalidate such election: *Ellis v. Karl*, 7 Neb. 381. Hence, where seven days' notice is required and only three days' notice is given, this will not vitiate an election: *State v. Carroll*, 17 R. I. 591, 24 Atl. 835. In this case, however, there had been two previous attempts to hold an election, which had proved unsuccessful. But where a statute requires thirty days' notice of an election, and an election is held only eighteen days after the act takes effect, so that sufficient time could not elapse between the time of the act going into effect and the election to give the required notice, the election was held to be void: *George v. Oxford Township*, 16 Kan. 72.

3. Notice of Election to Fill Vacancy.—Elections to fill vacancies caused by the death or resignation of an officer are special elections: *People v. Porter*, 6 Cal. 26; *People v. Rosborough*, 14 Cal. 180. And being special elections, notice of them should, as a rule, be given, or they will be invalid. Where the statute specifically requires notice, and the voters have no other means of knowing that an election to fill a vacancy is to take place, notice is mandatory: *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110. And this rule would seem to be sound, even though the special election is held at the same time as a general election: *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110; *People v. Thompson*, 67 Cal. 627, 9 Pac. 833; *Beal v. Morton*, 18 Ind. 346; since, in such a case, the electors have no means of knowing that a

vacancy is to be filled, and the official notice is the only manner provided for giving them such knowledge.

But we have already noticed a conflict of authority with respect to the necessity of giving notice of a special election which is to be held at the same time as a general election. And the same conflict seems to exist with reference to elections to fill vacancies held at the same time as a general election. The conflict, however, is more apparent than real, as will appear from an examination of the authorities. Thus, in *People v. Cowles*, 13 N. Y. 350, the statute provided that in case of a vacancy in a judgeship it should be filled by the electors at the next "general election of judges," which in fact occurred at the next general election. Hence, where, a vacancy occurred just prior to a general election, the court held that it could be properly filled at such election, notwithstanding the absence of all special notice that a vacancy was to be filled at that time. The statute itself in such a case is sufficient notice to the electors that a vacancy is to be filled. The correct rule doubtless is, that if the law fixes the time of holding a special election to fill a vacancy, the absence of special notice thereof will not vitiate the election. But where the law does not provide for the filling of vacancies at any special time other than as set by some executive authority by giving proper notice, such notice must be given, or the election will be invalid. Most of the authorities can be harmonized by the application of this rule. The Michigan cases recognize the distinction noted, as is apparent from *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110, where a special election to fill a vacancy, although held at the same time as a general election, was nevertheless deemed to be void. This case distinguishes the earlier case of *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70, on the grounds stated, since in this case the city charter made it imperative that a vacancy in a city office should be held at the next election. So, in *State v. Orvis*, 20 Wis. 235, where the office of sheriff was made vacant by the death of the incumbent, the failure to give notice of an election to fill the vacancy was held not to vitiate the election of a successor, since the constitution and statutes provided for and fixed the time for the election of sheriffs, and the election was held in accordance with these provisions. And the failure by the governor to state in his proclamation calling an election that a certain vacancy is to be filled will not invalidate the election of a person to fill such vacancy, where such election, at such time, is otherwise provided for by law: *State v. Thayer*, 31 Neb. 82, 47 N. W. 704. Especially is this true where the electors had actual notice of the fact and voted to fill the vacancy: *State v. Lansing*, 46 Neb. 514, 64 N. W. 1104; *State v. Skirving*, 19 Neb. 497, 27 N. W. 723; *Adsit v. Secretary of State*, 84 Mich. 420, 48 N. W. 31. But a special election to fill a vacancy, of which no notice is given, and which is in fact known to but few of the voters, is void: *Adsit v. Secretary of State*, 84 Mich. 420, 48 N. W. 31. This is more particularly true where the election to fill the vacancy does not take place at a regular general election when electors are presumed

to know that officers are to be elected: *Cook v. Mock*, 40 Kan. 472, 20 Pac. 259. If, however, the election is held at a general election, the voters had notice in fact of the vacancy, and the law required it to be filled at that time, the mere fact that many did not vote will not invalidate the election: *Adsit v. Secretary of State*, 84 Mich. 420, 48 N. W. 31.

c. Manner of Giving Notice.

1. **Failure to Give Notice in Required Manner.**—The actual giving of notice is usually the only essential requirement with respect to notice, and the failure to give notice in the particular manner required will not, as a rule, invalidate an election: *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376. So a failure to make a proper return of the publication of notice will not invalidate an election: *Commonwealth v. Smith*, 163 Mass. 411, 40 N. E. 189. It has been held, however, that the provisions of a statute as to the time of giving notice of a special election are mandatory, and a failure to observe them will invalidate an election held in pursuance of such notice, and this is true though the election was held at the time of a general election: *State v. Martin*, 83 Mo. App. 55. If a statute requiring notice is mandatory, the length of time for which such notice must be posted is probably mandatory as well. Where, through the neglect of a newspaper, the notice of an election was not published for the required number of days, an officer having no authority cannot change the date of election so that the requisite thirty days' notice can be given, and an election held on such changed date is void: *Field v. Hall*, 16 Tex. Civ. App. 233, 40 S. W. 749.

2. **Posting Notice.**—Where the law requires a notice to be published in one newspaper for a stated time, the fact that it was not published for the required time in all the newspapers to which the notice was given will not invalidate the election, when it was properly published in one of them: *Jordon v. Hayne*, 36 Iowa, 9. The failure of a clerk to post certified copies of a notice of election in each election precinct, as required by statute and ordinance, was held not to vitiate an election in *State v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958, where it appeared that the notice had been published in all the daily papers of the city for the required length of time, that the election was a matter of public notoriety, and had been discussed by the people generally, and the great body of the electors had voted. A failure to designate the places for posting notices of an election will not invalidate such election: *State v. Bernier* (Minn.), 38 N. W. 368. The fact that the particular officer appointed by law did not post the notices will have no effect on the result of the election where actual legal notice was given: *Demaree v. Johnson*, 150 Ind. 419, 49 N. E. 1062, 50 N. E. 376. Hence, the posting of notices by the clerk of a board of trustees instead of by the trustees themselves, will not invalidate an election held in pursuance of such notice: *Jordon v. Hayne*, 36

Iowa, 9; for the particular officers named in a statute are not required to act in person, but may employ others to post the notices: *Phillips v. Town of Albany*, 28 Wis. 340.

3. **Contents of Notice.**—In a notice of an election to be held for school trustees, a failure to state that vacancies were to be filled will not invalidate the election, where the voters were not in fact misled, and elected trustees for the respective terms fixed by law: *People v. Prewett*, 124 Cal. 7, 56 Pac. 619. So an erroneous designation of voting precincts will not vitiate an election, in the absence of fraud, and of any showing that anyone who desired to vote was unable to do so: *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749. A failure by electors to properly designate the place of holding a special election will not invalidate it, where such election was held at the customary place acquiesced in for years, and where no votes were lost by reason of such location of the voting place: *People v. Brown*, 189 Ill. 619, 60 N. E. 46.

A notice of a special election to vote for the issuance of bonds in aid of an improvement company must state the amount of bonds to be issued and the company for whose benefit the issue is to be made, or the resulting election and bond issue will be void: *People's Nat. Bank v. City of Pomona*, 48 Kan. 55, 28 Pac. 1089.

IX. Conduct of Election.

a. **Irregularities in General.**—While before an election all provisions of an election law are mandatory, if sought to be enforced, after an election is held they are held to be directory only, if this is possible: *Jones v. State*, 153 Ind. 440, 55 N. E. 229. This tendency to sustain elections is noticeable, and they are never held void, unless clearly illegal: *State v. Board of Freeholders of Hudson County*, 35 N. J. L. 269. It is, therefore, very generally held that the provisions of a statute as to the manner of conducting the details of an election are not mandatory, but directory merely, and irregularities in conducting an election and counting the votes, not proceeding from any wrongful intent, and which deprive no legal voter of his vote, will not vitiate an election, or justify the rejection of the entire poll of a precinct: *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002; *Bailey v. Hurst* (Ky.), 68 S. W. 867. As a general rule, mere irregularities in conducting an election, which do not affect the final result, do not vitiate such election: *Sprague v. Norway*, 31 Cal. 173; *Piatt v. People*, 29 Ill. 54; *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704; *Gass v. State*, 34 Ind. 425; *Irwin v. Lowe*, 89 Ind. 540; *Gilleland v. Schuyler*, 9 Kan. 569; *Napier v. Cornett* (Ky.), 68 S. W. 1076; *Webre v. Wilton*, 29 La. Ann. 610; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *McKinney v. O'Connor*, 26 Tex. 5; *Loomis v. Jackson*, 6 W. Va. 613; the election otherwise being fairly and honestly conducted, and no legal voter is deprived of his franchise, or illegal votes received: *Piatt v. People*, 29 Ill. 54;

and where the irregularity cannot possibly prejudice any substantial right: *Irwin v. Lowe*, 89 Ind. 540; or cast uncertainty on the result: *Gass v. State*, 34 Ind. 425; *Webre v. Wilton*, 29 La. Ann. 610; *De Berry v. Nicholson*, 102 N. C. 465, 11 Am. St. Rep. 767, 9 S. E. 545. Mere trivial irregularities are not sufficient to allow the vote of an entire precinct to be thrown out: *Napier v. Cornett* (Ky.), 68 S. W. 1076; such as the performance of directory provisions of the law in a mistaken manner: *Thompson v. Ewing*, 1 Brewst. 67. A different rule would make the manner of performing a public duty more important than the duty itself: *Loomis v. Jackson*, 6 W. Va. 613.

The errors or irregularities which warrant the rejection of ballots are generally such as deprive lawful electors of their right to vote, or receiving the ballots of persons not entitled to vote: *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451. Even great irregularities on the part of election officers will not of necessity vitiate an election, where no fraud was committed or attempted, no illegal vote was polled, and no legal voter was deprived of his vote: *Morris v. Vanlaningham*, 11 Kan. 269. But the election will be void if the irregularities are so gross and of such a nature that the return of the officers is unintelligible or unworthy of credence: *Thompson v. Ewing*, 1 Brewst. 67.

It is not necessary to connect any candidate with the misconduct and irregularities of the election officers. It is enough to show that an election was conducted corruptly, without reference to any connivance of a candidate: *Blue v. Peter*, 40 Kan. 701, 20 Pac. 442.

b. Effect of Statutory Provisions.—Where there is an entire disregard of conformity to the statute in holding and conducting an election, whether it is by design or ignorance, an entire election may be avoided: *Melvin's Case*, 68 Pa. St. 333. Hence, an election held in total disregard of the Australian ballot law is illegal and void: *Gaston v. Lamkin*, 115 Mo. 20, 21 S. W. 1100; for an election must be conducted substantially in the manner prescribed by law: *Van Amringe v. Taylor*, 108 N. C. 196, 12 S. E. 1005. And where the legislature declares that certain irregularities in election procedure shall be fatal to the validity of the returns, the courts will effectuate that command, otherwise they will ignore such innocent irregularities as are free from fraud, and have not interfered with a fair expression of the voter's will: *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101; for except when the prescription of an election law is that a thing shall be done in a certain way, and not otherwise, it will be construed as merely directory: *Webre v. Wilton*, 29 La. Ann. 610; *State v. Van Camp*, 36 Neb. 91, 54 N. W. 113. Indeed, statutory regulations concerning the manner of conducting elections are deemed directory only, unless a noncompliance is expressly declared to be fatal to the validity of the election, or will change or make doubtful the result: *Willeford v. State*, 43 Ark. 62; *Trimmier v. Bomar*, 20 S. C. 354. Such provisions should

be construed as mandatory only when the real merits of the case are affected: *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457.

The fact that an election must be special under the provisions of an act will not invalidate it because it is held on the same day that a state election is held: *Winn v. Board of Park Commrs.* (Ky.), 14 S. W. 421. Statutory restrictions should be complied with, however. So where an election was held to vote on a proposition to give aid to a railroad, and the proposition contained a provision that the bonds to be issued should be such as to entitle them to registration under a certain act, and under this act a majority vote of the legal voters living in the township was necessary to entitle the bonds to registration, the fact that a majority of the voters living in the township do not vote will render the election null and void, although a majority of those voting voted in favor of the proposition: *McWhorter v. People*, 65 Ill. 290; *People v. Chapman*, 66 Ill. 137.

The fact that an election is held under a defective, or even under an unconstitutional, law, will not defeat such election: *Andrews v. Sancier*, 13 La. Ann. 301. But where an election law has been repealed, registration lists and ballot-boxes prepared under it cannot be made use of, nor can a valid election be held under it: *Munroe v. Wells*, 83 Md. 505, 35 Atl. 142.

c. **Presence of Persons at Polling Place.**—In the absence of fraud, the mere presence of unauthorized persons at a polling place will not invalidate the vote at that particular precinct: *In re Contested Election of Walker*, 3 Luz. Leg. Reg. 130. But where an unauthorized person, who is unfavorable to one of the candidates, is allowed to remain within the polling place and talks freely with electors to influence their voting, the law has been so disregarded that the vote of the precinct should be thrown out: *Gill v. Backus*, 108 Mich. 419, 66 N. W. 347.

The refusal for a short time to allow a representative of one of the candidates to be present in the polling-room will not of itself invalidate the election at such precinct: *State v. Commissioners*, 42 Kan. 739, 22 Pac. 735. Neither will the refusal of the judges to allow an elector to be present in the room as a challenger of voters, in the absence of evidence that any injustice resulted: *Soper v. County of Sibley*, 46 Minn. 274, 48 N. W. 1112.

d. Registration or Poll Books.

1. **Failure to Furnish.**—The failure of county commissioners to furnish a correct copy of the resident taxables to the officers of election in one of the election districts is not sufficient ground for setting aside the election: *Contested Election of Wheelock*, 82 Pa. St. 297. So a failure to furnish a list of authorized voters has been held to be a noncompliance with a mere directory provision of the statute which will not vitiate an election: *New Orleans v. De St. Romes*, 9 La. Ann. 573. The fact that a registration-book has been lost will not vitiate an election, where the registrar pro-

cured a new book, in which he entered the names of such persons as he knew had theretofore been registered, and also the names of those who subsequently applied for registration, where at the ensuing election no one voted who was not entitled to vote, and no one who was entitled to vote was excluded: *Hampton v. Waldrop*, 104 N. C. 453, 10 S. E. 694. Even the absence of register poll lists at an election will not necessarily invalidate such election: *Taylor v. Taylor*, 10 Minn. 107; *Edson v. Child*, 18 Minn. 64; where the statute does not make register poll lists essential to the validity of an election: *Edson v. Child*, 18 Minn. 351. The fact that the lists of voters are not certified does not invalidate an election, where the lists used were correct copies of the original registration-books: *Pickett v. Russell*, 42 Fla. 116, 28 South. 764.

2. Failure to Properly Use.—The use of a check list of voters at an election is not essential to the validity of an election, where not made so by statute: *State v. Gilman*, 96 Me. 431, 52 Atl. 920. The failure to use a register of voters will not invalidate an election, where it is not shown that any illegal votes were cast by reason thereof: *People v. Logan County*, 63 Ill. 374. Neither will the failure to keep separate poll lists of all persons voting vitiate an election: *State v. Elwood*, 12 Wis. 551. Nor the fact that the poll list was kept by the town clerk instead of by regular appointed poll clerks as provided by law: *People v. Bidelman*, 69 Hun, 596, 23 N. Y. Supp. 954. But where no poll-book was made out at all, and no record whatever of the votes given was kept by the election officers, the only record of votes being that made by a private person on his own motion, in a book prepared by himself, the election will be declared void: *Norman v. Boaz*, 85 Ky. 557, 4 S. W. 316.

e. Polling Place.

1. Polling Place Outside Election District.—We have already noticed under a previous head that an election in a precinct is not necessarily invalidated by reason of the fact that it is held outside of the precinct, although it is if held outside of the state. Hence, if voting precincts are not established as required by law, the fact that by mistake electors vote outside of the precinct of their residence will not invalidate the election: *Ex parte White*, 33 Tex. Cr. Rep. 594, 28 S. W. 542. This would form an exception to the rule that an election must be held at the place prescribed by law, place being an element of suffrage. Of course, voters must not vote at a polling place outside their election district: *In re Contested Election of Yonkin (Pa.)*, 13 Atl. 750; unless the polling place has been established there by law: *In re Kinnear's Contested Election*, 2 Pa. Co. Ct. Rep. 666.

2. Election at Other than Established Polling Place.—It is generally essential to the validity of an election that it be held at the time and place authorized by law: *Snowball v. People*, 147 Ill. 260, 35 N. E. 538. If it is not held at the place provided by law, it will be invalid: *Walker v. Sanford*, 78 Ga. 165, 1 S. E. 424. But

a failure to designate the place where an election is to be held will not render an election void: *State v. Bernier* (Minn.), 38 N. W. 368. Where a polling place has not been established at a particular place, and a few voters assemble there, organize, and hold an election, it is obviously invalid: *Williams v. Potter*, 114 Ill. 628, 3 N. E. 729.

The rule that an election must be held at the place designated by law does not necessarily mean that it should be held in the precise spot designated. Some necessity may arise at the time of an election which would prevent the voting from taking place in the exact place intended. But there should be some necessity which requires the removal of the voting place, otherwise it should be held at the place designated: *Melvin's Case*, 68 Pa. St. 333. Hence, voters cannot withdraw from the regular voting places on account of alleged frauds, and conduct for and by themselves a valid election elsewhere: *Word v. Sykes*, 61 Miss. 649. So an election held several miles from an established voting place, when there is no necessity therefor, will invalidate the election: *Knowles v. Yates*, 31 Cal. 82. And an election held at a place more than three miles from the place designated will invalidate an election: *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, 24 Pac. 93; *Walker v. Sanford*, 78 Ga. 165, 1 S. E. 424.

If, however, there exists any necessity for changing the voting place, it may be held near the place designated and will be valid. Thus, where the building in which an election was to be held was destroyed by fire the night before an election, a valid election could be conducted near such place: *Melvin's Case*, 68 Pa. St. 333. An election, though not held at the place designated, is nevertheless valid if held near and within sight of such designated place, and the reasons for changing the place of holding it are shown: *Roper v. Scurlock* (Tex. Civ. App.), 69 S. W. 456. So where the owner of the house, in which an election was to be held objects to the election proceeding there, polls may be opened a short distance therefrom and in plain view of the place, and the election will be valid, no voter being misled or deprived of his vote by reason of such change: *Preston v. Culbertson*, 58 Cal. 198; *Dale v. Irwin*, 78 Ill. 170. In *Steele v. Calhoun*, 61 Miss. 556, the house in which the voting had taken place for several years had been moved three-quarters of a mile, and yet an election at the same house at its new site was not deemed to be invalid on that account. And in *Ex parte Segars*, 32 Tex. Cr. Rep. 553, 25 S. W. 26, an election was not considered void by the mere fact that the polls were held two blocks from the designated place, although if an election contest had been instituted the court intimated that such an irregularity might probably have been taken advantage of. Where a notice stated that an election would be held at a certain store, the fact that it was held at a storehouse on the same premises where previous elections had been held, and no voter could be or was misled, will not invalidate it: *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30.

3. Change of Polling Place.—As may be inferred from the previous discussion, a voting place changed by reason of necessity will not invalidate an election. Especially where proper notice of such change has been given, and no one has been deprived of his vote on this account: *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867. And the rule is the same though no notice is given, if the change had no effect on the result of the election: *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 185. Any change in the place of voting which would mislead voters, or prevent a full and fair election, will render an election invalid. But a slight change in the place of voting, which misleads or deceives no voter, will not have such a result: *Simons v. People*, 119 Ill. 617, 9 N. E. 220. So the adjournment of an election in good faith from one polling place to another is at most an irregularity, which will not vitiate the election in the absence of any showing that it affected the result: *Farrington v. Turner*, 53 Mich. 27, 51 Am. Rep. 88, 18 N. W. 544. Changing the place of election on election day will not invalidate the election, where a boy was stationed at the designated place to inform all persons where the election was in fact being held: *Wakefield v. Patterson*, 25 Kan. 709.

Where a regular polling place is established by law, an election held at some other place remote therefrom and clandestinely selected, is invalid: *Webre v. Wilton*, 29 La. Ann. 610. And where the place of holding an election is fixed by statute, with no power conferred by such act to change it, an unauthorized change of such election place cannot be made: *Egley v. Armstrong County Commrs.*, 158 Pa. St. 65, 27 Atl. 851.

4. Number of Polling Places.—The unauthorized establishment of two polling places in an election district instead of only one will not invalidate an election where no prejudice results to the defeated candidate by reason of such irregularity: *Bowers v. Smith*, 111 Mo. 45, 33 Am. St. Rep. 491, 20 S. W. 101; *Bowers v. Smith (Mo.)*, 17 S. W. 761. So where the polling places in an election district are changed from one to three, this is not such an irregularity as will avoid an election: *Ex parte Williams*, 35 Tex. Cr. Rep. 75, 31 S. W. 653. Conversely, the failure to divide an election district into two as required by law will not invalidate an election held therein: *Burrough v. Browning*, 9 N. J. Law Journal, 110.

5. Failure to Open Polls in Certain Precincts.—A failure to open polls in every precinct will not necessarily invalidate an election, where it is not made necessary by statute: *Hobart v. Butte County Supervisors*, 17 Cal. 23. But where the law imperatively requires all precincts to have polls opened in them, a failure to do so will render an election void: *State v. Board of Commrs.*, 92 Ind. 133. In *Marshall v. Kerns*, 2 Swan, 68, it seems to have been held that a failure of this character would always vitiate an election. But the apparent doctrine of this case was limited in *Louisville etc. R. R. Co. v. County Court*, 1 Sneed, 637, 62 Am. Dec. 424, where the correct

doctrine was laid down that the mere fact that officers failed to open polls in one or more election precincts will not of itself vitiate an election. To have such effect it must appear that such failure **did** or might have affected the general result of the election. This case was subsequently approved in *McCraw v. Harralson*, 4 Cold. 34, and we believe states the correct rule. See, also, *Ex parte Kennedy*, 23 Tex. App. 77, 3 S. W. 114, where the court, quoting from *Cooley's Constitutional Limitations*, says: "Although the failure of one election precinct to hold an election or to make a return of the votes cast might not render the whole election a nullity, where the electors of that precinct were at liberty to vote had they so chosen, or where having voted but failed to make return, it is not made to appear that the votes not returned would have changed the result; yet, if any action was required of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportunity to participate, and no mode was open to the electors by which the officers might be compelled to act, it would seem that such neglect, constituting, as it would, the disfranchisement of the excluded electors *pro hac vice*, must, on general principles, render the whole election nugatory; for that cannot be called an election, or the expression of the popular sentiment, where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded."

f. Time for Voting.

1. Opening Polls.—While it is essential that an election should be held at the time prescribed by law, or it will be void, yet a mere delay in opening polls will not of itself vitiate an election. Some courts treat the matter with more liberality than others. A very short delay probably will never warrant a rejection of the returns from a precinct. Thus, a delay of half an hour was held not to affect the validity of an election, where no one was deprived of the privilege of voting: *People v. Prewett*, 124 Cal. 7, 56 Pac. 619. So the mere fact that polls were not opened precisely at sunrise will not vitiate an election: *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079. And the delay of an hour will not render an election void: *Pickett v. Russell*, 42 Fla. 116, 28 South. 764; *Clark v. Leathers* (Ky.), 5 S. W. 576; although one person was thereby prevented from voting: *Pickett v. Russell* (Fla.), 28 South. 764. Opening an hour later and closing an hour earlier did not vitiate an election in *Graham v. Graham* (Ky.), 68 S. W. 1093. Opening polls an hour and a half late will not invalidate an election: *Marks v. Park*, 7 Leg. Gaz. 70.

The law requiring polls to be opened should be substantially complied with, however, and where it is not an election will be declared void, or the vote of a particular precinct will be rejected: See *People v. Sutphin*, 53 App. Div. 613, 66 N. Y. Supp. 49; *People v. Hill*, 125 Cal. 16, 57 Pac. 669. So where the law requires the polls to be open from sunrise to sunset, the fact that they are open only between the

hours of 1 and 6 P. M. will invalidate the election: *People v. Seale*, 52 Cal. 620. And where polls should have been opened at sunrise, but were not opened until 10 o'clock at a certain precinct, the votes cast thereat should be rejected: *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454. The same result occurs where polls, which should be open at 6 A. M., are not open until 2 P. M.: *Melvin's Case*, 68 Pa. St. 333.

2. **Closing Polls Too Soon.**—The same principles already noted are applicable to the closing of polls, except that the law is held to be more strict and more mandatory in character as applied to provisions that polls shall remain open until a stated time. Provisions of a statute relating to the opening and closing of polls are generally deemed to be directory only, if substantially complied with, and where no obstruction to a fair expression of the will of the people is shown, a failure to strictly comply with the statute will not vitiate an election: *Holland v. Davies*, 36 Ark. 446; *Fry v. Booth*, 19 Ohio St. 25. So closing the polls at 5 o'clock, instead of at sunset will not invalidate an election: *People v. Hasbrouck*, 21 Misc. Rep. 188, 47 N. Y. Supp. 109. Neither will the closing of polls one hour earlier than required by law: *State v. Smith*, 4 Wash. 661, 30 Pac. 1064; *Cleland v. Porter*, 74 Ill. 76, 24 Am. Rep. 273. At least where no one is prevented from voting by reason thereof: *Cleland v. Porter*, 74 Ill. 76, 24 Am. Rep. 273. But in *People v. Hill*, 125 Cal. 16, 57 Pac. 669, the fact that polls in certain precincts were closed one hour too soon was held to justify the rejection of the votes cast therein. Clearly, if polls are so prematurely closed that many electors are deprived of the right to vote, an election should be set aside; *Penn District Election*, 2 Pars. Eq. Cas. 526, especially if the votes which would have otherwise been cast would have changed the result: *State v. Woolen*, 39 Iowa, 380.

3. **Failure to Close on Time.**—In Kentucky it seems that the provision of an election law regarding the closing of polls is considered mandatory, and a failure to observe the law and to close on time will vitiate the election in a particular precinct: *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457. The more general holding, however, appears to be that such provisions are directory only: *Swepton v. Barton*, 39 Ark. 549. And a failure to observe such a provision will not prove fatal, unless enough votes were cast after the hour of closing to change the result: *Piatt v. People*, 29 Ill. 54; *In re Election of Ward*, 3 Clark, 11, 4 Pa. L. J. 341. So where no votes were cast after the hour for closing had arrived, the mere fact that the polls were kept open will not vitiate an election: *Soper v. County of Sibley*, 46 Minn. 274, 48 N. W. 1112. Indeed, the Kentucky cases cited seem from their facts not to sanction a different rule from that recognized elsewhere, for it is to be noted that enough votes were received after the hour when the polls should have been closed, to change the result of the election, and for this reason it was held proper to reject the entire

vote of the precinct where the law was violated: See, especially, *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149.

A failure to make proclamation thirty minutes before closing the polls as required by law will not vitiate an election: *Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381.

g. Voting.

1. **In General.**—The calling of particular persons from the crowd to vote, in order to save time, is not such an irregularity as to invalidate an election, where it did not appear that anyone did not vote or left the polling place on account of the delay: *Bailey v. Hurst* (Ky.), 68 S. W. 867. The fact that there was talk around the polls that no one would be allowed to vote unless he was re-registered will not vitiate an election, where no one was challenged on that ground, even though persons did not offer to vote because of this belief: *People v. Prewett*, 124 Cal. 7, 56 Pac. 619.

Where a statute requires a vote to be taken *viva voce*, an election by secret ballot is absolutely void: *Elliott v. Burke* (Ky.), 68 S. W. 445. So where an act authorizes an election to vote aid to a railroad, the authorities "to take the sense of the holders or real estate in a city," an election must show an expression of their wishes per capita, and hence if the vote is taken pro rata according to the value of real estate owned, each voter being allowed one vote for every hundred dollars of assessed real estate owned by him, there is not a compliance with the act, and the election is void: *Montgomery v. State*, 38 Ala. 162.

2. **Use of Ballot-boxes.**—The fact that there was but one ballot-box provided, when the statute required two, is immaterial if the facilities afforded by the one were ample: *Chapman v. State* (Tex. Cr. App.), 39 S. W. 113. So separate ballot-boxes may be used: *Attorney General v. Board of County Canvassers*, 64 Mich. 607, 31 N. W. 539. And the fact that three ballot-boxes were in use instead of one is an irregularity that will not make the election void, unless the result would have been different if no such irregularity had existed: *Weil v. Calhoun*, 25 Fed. 865.

The mere position of a ballot-box will have no result on the election, in the absence of special injury: *Augustin v. Eggleston*, 12 La. Ann. 366. Hence, the fact that the ballot-box could not be seen by voters who stood near the window at a polling place cannot be a cause to annul the election: *Burton v. Hicks*, 27 La. Ann. 507. And if ballot-boxes are left unguarded for a few minutes, it will not vitiate an election, where there was no fraud and the boxes were not tampered with: *Marks v. Park*, 7 Leg. Gaz. 70. But in *Tebbe v. Smith*, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454, where the ballot-box was taken by one of the election officers when he went to lunch and left on the table while he was eating, and there were other substantial violations of the election law in a certain precinct, the vote of such precinct was rejected as void. Opening a ballot-box to take out a pen was held not to vitiate an election in

Bailey v. Hurst (Ky.), 68 S. W. 867. The direction of the statute that the ballot-box must not be opened was considered subservient to the more essential direction that an election must be held; so where the only pen of the clerk fell into the box by accident, the opening of the box to take the pen out, so that the election might proceed, was not deemed improper, none of the ballots being touched.

3. Use of Ballots.—The fact that officers fail to do their duty in properly preparing official ballots will not affect the election, where the voters are innocent, and honestly use such ballots: *State v. Fransham*, 19 Mont. 273, 48 Pac. 1. A failure to place a party emblem at the head of a ticket, or to print directions on a ballot how to vote, will not invalidate an election fairly conducted and free from fraud: *Jones v. State*, 153 Ind. 440, 55 N. E. 229. That a vote is printed instead of written is immaterial: *Temple v. Mead*, 4 Vt. 535. But where the voter is to print or write the word “yes” or “no” after the proposition to be voted for, the fact that the election officers in preparing official ballots printed the word “yes” after the proposition is such a substantial violation of the law as to render an election void: *San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 58 Pac. 699. Where the name of a candidate was written on the official ballot after such ballot had been printed it will not invalidate the votes cast for such candidate: *State v. Van Camp*, 36 Neb. 91, 54 N. W. 113.

The use of sample ballots instead of the regular official ballot by reason of an honest mistake does not vitiate an election: *Boyd v. Mills*, 53 Kan. 594, 42 Am. St. Rep. 306, 37 Pac. 16. Neither will the fact that ballots are colored instead of white have such effect: *Boyd v. Mills*, 53 Kan. 504, 42 Am. St. Rep. 306, 37 Pac. 16; *State v. Wolf*, 17 Or. 119, 20 Pac. 316. Ballots should not be rejected simply because they differ from the regulations prescribed by the code in matters over which the elector has no control, such as the size of the ballot, the kind of paper on which it is printed, or the character of type used in printing: *Kirk v. Rhoads*, 46 Cal. 398; *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325. But see *Reynolds v. Snow*, 67 Cal. 497, 8 Pac. 27; and *State v. Sadler*, 25 Nev. 131, 83 Am. St. Rep. 573, 58 Pac. 284, 59 Pac. 546, 63 Pac. 128. In this last case where there were sufficient official ballots at a precinct to hold an election, and a few improper ballots were used, the latter were declared void. The failure of an election clerk to write his name or initials on the back of a number of the ballots before handing them to the electors, will not invalidate the vote of a precinct: *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867. Neither will the failure of a clerk to write his initials in the corner of the ballot designated by statute have such effect: *Jones v. State*, 153 Ind. 440, 55 N. E. 229. But in Nebraska the provisions of the statute appear to be mandatory that ballots must be indorsed by two of the judges, and if it is not done, such ballots will not be counted: *Mauek v. Brown*, 59 Neb. 382, 81 N. W. 313; *Orr v. Bailey*, 59 Neb. 128, 80

N. W. 495. Only the particular ballots not indorsed are invalidated, however.

Ballots cannot be counted for a candidate where his name and the title of his office are not placed on the official ballot, but upon separate stickers which are pasted upon the official ballot by the persons who voted for him: *Lawlor's Contested Election*, 180 Pa. St. 566, 37 Atl. 92.

4. Assistance to Voters.—The statutes quite generally provide that assistance may be given to illiterate or disabled voters. Such voters are required to make oath to the fact of their disability. And a failure to make such oath will invalidate such votes cast, the statute being held mandatory: *Attorney General v. May*, 99 Mich. 538, 58 N. W. 483; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543. The principal case establishes a different doctrine, so far as concerns the validity of a particular vote. Where, however, there is fraudulent misconduct in assisting voters, and votes are prepared directly contrary to the expressed wishes of the voters, the election in a particular precinct will be void: *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680; and the principal case. In these cases the central idea of the secrecy of the ballot is disregarded: *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149. The mere fact that one judge of the election instead of two, as required by law, assisted an illiterate voter, will not invalidate the ballot: *Hansecom v. State*, 10 Tex. Civ. App. 638, 31 S. W. 547. But where coupled with this irregularity there is evidence of the greatest fraud and misconduct of election officers in conducting the election, the entire vote of that precinct will be rejected: *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680.

5. Preparation and Use of Booths.—The particular arrangement of a polling place will not make an election void, where there is no indication that it produced injurious results: *Conaty v. Gardner* (Conn.), 52 Atl. 416. So the failure of election officers to prepare booths and guard-rails so as to comply strictly with the statute will not invalidate an election, where such irregularities do not defeat the purpose of the requirement in protecting the secrecy of the ballot, or in any way affect the result of the election: *Perry v. Hackney* (N. Dak.), 90 N. W. 483. The fact that there are outside windows in the room where booths are placed cannot vitiate an election, where the windows were securely fastened, and caused no improper conduct: *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30. Neither will such a result occur where two voters occupy the same booth, but upon being at once informed that this could not be permitted, they immediately occupied separate booths: *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30.

But where an unofficial person is given the custody of the ballots in direct violation of law, and is allowed access to booths, instructing voters how to vote, the election in such precinct will be void, notwithstanding the parties acted in good faith: *Attorney General v. Kirby*, 120 Mich. 592, 79 N. W. 1009. So if regular officers electioneer

with voters in the booths, urging them to allow such judges to prepare their ballots, and ballots were prepared by one judge instead of two, many of the ballots being directly contrary to the expressed wishes of the voters, the election will be void: *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680. And an election may be avoided by allowing third persons to enter the booths with voters, mark their votes for them, and deposit such votes for the voters, since the provisions of the election law designed to secure and preserve the secrecy of the ballot are mandatory: *Attorney General v. McQuade*, 94 Mich. 439, 53 N. W. 944. So where ballots are marked in the presence of others, inspectors and challengers enter the booths with voters, and outsiders are allowed to communicate with voters during the election, the entire vote of the precinct should be rejected: *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149.

6. **Rejection of Votes.**—Where an election is conducted honestly and in good faith, the mere fact that inspectors, through an error in judgment, exclude the votes of qualified electors, will not necessarily invalidate an election. And in *State v. Hanson*, 87 Wis. 177, 41 Am. St. Rep. 38, 58 N. W. 237, it was held that this was true, although the votes excluded were sufficient in number to have changed the result. The rule is obviously true where the rejection of ballots does not change the result: *State v. Morris*, 14 Wash. 262, 44 Pac. 266. And even if the number of votes rejected is sufficient to change the result, yet if it is shown as a matter of fact that if they had been received the result would not have been different, the election will not be declared invalid: *Truesdell v. Bryan*, 24 Tex. Civ. App. 386, 60 S. W. 60.

There are cases, however, which seem to declare that if the rejected legal votes are sufficient in number to have changed the result, the election will be avoided, even though it does not appear for whom such rejected votes would have been cast: *Swepton v. Barton*, 39 Ark. 549; *Pickett v. Russell*, 42 Fla. 116, 28 South. 764. We doubt whether such is the rule, however, unless it is made to appear that the rejected votes, if received, would have in fact changed the result: See *DeLoatch v. Rogers*, 86 N. C. 357; *Trustees of School Dist. v. Gibbs*, 2 Cush. 39. And we believe this should be the rule, since an error in refusing to allow electors to vote is almost impossible to correct, as it cannot be known with certainty how they would vote. This was clearly pointed out by Judge Cooley in his *Constitutional Limitations*, and he adds: "It is obvious that it would be dangerous to receive and rely upon their subsequent statements as to their intentions, after it is ascertained precisely what effect their votes would have upon the result. An election honestly conducted under the forms of law ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters have been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but, as it is gen-

erally impossible to arrive at any greater certainty of result by resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future": See, also, *State v. Hanson*, 87 Wis. 177, 41 Am. St. Rep. 38, 58 N. W. 237.

7. **Receiving Illegal Votes.**—Like the rejection of legal votes, the mere receiving of illegal votes will not necessarily invalidate an election which is honestly and fairly conducted: *Thompson v. Ewing*, 1 Brewst. 67; *Woolley v. Louisville etc. R. R. Co.*, 93 Ky. 223, 19 S. W. 595; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Ex parte Murphy*, 7 Cow. 153.

There would seem to be this difference, however, between receiving illegal votes and rejecting legal ones, that in the former case there is much greater opportunity to show for whom the illegal votes were cast, and thus ascertain who received the highest number of legal votes cast, while in the latter case this is almost impossible of ascertainment.

If the illegal votes can be eliminated and the true result of the legal votes ascertained, the reception of illegal votes will not defeat an election: *Woolley v. Louisville etc. R. R. Co.*, 93 Ky. 223, 19 S. W. 595. If a poll can be purged of the illegal votes cast, effect should be given to the unimpeached votes, and the vote will not be invalid: *Ferguson v. Allen*, 7 Utah, 263, 26 Pac. 570. If the number of illegal votes is so great, and the fraud is of such a character that it is impossible to ascertain who received the greatest number of legal votes, the vote of a precinct will be rejected: *People v. Hanna*, 98 Mich. 515, 57 N. W. 738; *Attorney General v. May*, 99 Mich. 538, 68 N. W. 483; *Ferguson v. Allen*, 7 Utah, 263, 26 Pac. 570. But it is not sufficient to show that the number of illegal votes cast were greater than the plurality for the successful candidate, but it must be shown that the other candidate was elected by a plurality of the legal votes cast: *Lehlbach v. Haynes*, 54 N. J. L. 77, 23 Atl. 422. And see *Montgomery v. Oldham*, 143 Ind. 34, 42 N. E. 474.

Where the number of illegal votes received is not sufficient to change the result, an election will not be avoided: *Hacker v. Conrad*, 131 Ind. 444, 31 N. E. 190; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935; *First Parish v. Stearns*, 21 Pick. 148; *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Judkins v. Hill*, 50 N. H. 140; *Deloatch v. Rogers*, 86 N. C. 357; *Thompson v. Ewing*, 1 Brewst. 67; *Swepton v. Barton*, 39 Ark. 549.

The illegal reception of votes cannot be allowed to affect the election or change the result, unless it is shown for whom the illegal votes were cast: *People v. Cicott*, 16 Mich. 283, 97 Am. Dec. 141. After the correction of the illegal vote, it must show a majority for the contesting party, or the election will stand: *Deloatch v. Rogers*, 86 N. C. 357. And see *Athison etc. R. R. Co. v. Jefferson County Commrs.*, 17 Kan. 29; *Trustees of School District v. Gibbs*, 2 Cush. 39.

It must be affirmatively shown that a sufficient number of illegal votes were received by the successful candidate to reduce his vote to a minority if they had been rejected: *Ex parte Murphy*, 7 Cow. 153; *Lehlbach v. Haynes*, 54 N. J. L. 77, 23 Atl. 422; *Russell v. McDowell*, 83 Cal. 70, 23 Pac. 183.

There may be such irregularity and illegality in the improper reception of votes at a precinct as to render it impossible to ascertain the actual legal vote cast, and the vote of such precinct should, in such case, be rejected: *Ferguson v. Allen*, 7 Utah, 263, 26 Pac. 570. Thus where nearly one-half of the votes appear to be illegal, and many legal votes were rejected, the entire vote will be vitiated: *Mann v. Cassidy*, 1 Brewst. 11. So where the judges of an election receive a large number of illegal votes, and cause fictitious names to be placed on the poll-books, and put spurious ballots in the ballot-box, the returns from that precinct should be rejected: *Blue v. Peter*, 40 Kan. 701, 20 Pac. 442; *Russell v. State*, 11 Kan. 308. See, also, *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149. And where persons were permitted to vote who had not paid their poll taxes, votes of certain persons known to be dead were received, others were recorded as voting who did not vote, and others who did not live in the township, all such votes being cast for the successful candidate, and the election officers were strong partisans of his, one of them saying before the votes were counted that the contestant only received a certain number of votes, and that was all they were going to give him, the returns from such township are properly rejected: *Rhodes v. Driver*, 69 Ark. 501, 86 Am. St. Rep. 215, 64 S. W. 272. In an election to decide a question upon which, by statute, only qualified property owners can vote, the admission of unqualified votes to a number equal to the majority upon which the question is decided will annul the election: *Scott v. Twombly*, 20 Misc. Rep. 652, 46 N. Y. Supp. 1084. The court here said that this case was not the same as that where illegal votes were cast at an election of officers, since the statute provided what kind of a vote was necessary to carry the election.

The fact that an excess of ballots were cast—that is, more than there were names of voters on the poll lists—will not invalidate an election: *Rankin v. Pitkin*, 50 Iowa, 313.

8. Failure of Electors to Vote.—Elections are not rendered void merely because of the meagerness of the vote cast: *Augustin v. Eggleston*, 12 La. Ann. 366. The fact that only a small vote was cast will not have such effect: *Edwards v. Loy* (Ky.), 68 S. W. 1091. On the other hand, the fact that every voter in a township participated in an election will not validate an otherwise illegal election: *Commonwealth v. Baxter*, 35 Pa. St. 263. Where a statute prohibits those voting at an election to vote for more than two of three officers to be elected, the fact that the statute was unconstitutional will not invalidate an election held in accordance with its terms: *People v. Perley*, 80 N. Y. 624.

An election may be avoided, however, by reason of the smallness of the vote, if it is a special election to fill a vacancy, no notice has been given of it, and the fact that a vacancy was to be filled was not known to any considerable portion of the electors: *State v. McKinney*, 25 Wis. 416. Of similar effect is *Bolton v. Good*, 41 N. J. L. 296.

h. Effect of Void Precinct Vote.—That the vote of one precinct is illegal and void will not vitiate an entire election, where the deduction of the vote of such precinct from the whole returns will not change the result already announced: *Roper v. Seurlock* (Tex. Civ. App.), 69 S. W. 456. But where the precincts in which illegal elections were held have a majority of the qualified voters of the district, and the statute under which the question is submitted to a vote of the electors requires that before it shall become operative it shall be submitted to a vote of the legal voters of the district, the election result will not be declared on the votes legally cast, adverse to what it would have been if no illegality had intervened: *People v. Salomon*, 46 Ill. 415.

i. Effect of Fraud.—Where the entire proceedings connected with the conduct of an election are tarnished with fraud, the entire returns will be rejected: *Mann v. Cassidy*, 1 Brewst. 11; *Weaver v. Given*, 1 Brewst. 140. But it is only in extreme cases that an entire poll will be rejected: *Contested Elections of 1867*, 1 Brewst. 162. And the mere fact that there has been some fraud in the conduct of an election will not necessarily invalidate the entire returns. Thus where it is possible to ascertain the fraudulent vote, the entire vote will not be rejected: *Mann v. Cassidy*, 1 Brewst. 11; for in such a case the fraudulent vote can be deducted: *State v. Sullivan*, 44 Kan. 43, 23 Pac. 1054. And if the legal votes can be ascertained and separated from the fraudulent vote, effect will be given to them: *State v. Malo*, 42 Kan. 54, 120, 22 Pac. 349. If the true vote can be ascertained, courts will not reject an entire poll: *Contested Elections of 1867*, 1 Brewst. 162. Unless the number of illegal votes is so great as to amount to proof of fraud of the entire election, the accuracy of the return will not be affected, but it will be corrected by deducting the illegal votes: *Windes v. Nelson*, 159 Mo. 51, 60 S. W. 129.

But if the election is so irregular and fraudulent that the true result cannot be ascertained, the returns should be rejected: *Chamberlain v. Woodin*, 2 Idaho, 609, 23 Pac. 177; *State v. Malo*, 42 Kan. 54, 120, 22 Pac. 349. And if the extent of the frauds cannot be ascertained, the return should be thrown out: *Londoner v. People*, 15 Colo. 557, 26 Pac. 135. If it cannot be ascertained for whom fraudulent votes were cast, it seems that the entire poll may be rejected, or the fraud be apportioned among the parties, deducting the fraudulent vote proportionately from all candidates: *Heyfron v. Mahoney*, 9 Mont. 497, 18 Am. St. Rep. 757, 24 Pac. 93.

Where overseers of election are not permitted to serve and are

driven away from the polls, there is raised such a violent presumption of fraud that in the absence of a perfect showing of legality, fairness and regularity upon the face of the election papers themselves, the whole poll will be invalidated: *In re Duffy*, 4 Brewst. 531. It was held that the returns of an election held in a township for the permanent location of a county seat must be entirely ignored, where the election officers would not permit any one of the opposing party to be present in the polling-room during the reception of the vote; that the certificate as to the number of votes polled was not made or posted as required by law; that the officers refused to state the number of votes polled; that through the fraud of the officers and outsiders, a greater number of votes were returned than there were voters in the township; and that these fraudulent votes were so mixed up with the honest vote that it could not be determined how many were honest, and how many fraudulent: *State v. Malo*, 42 Kan. 54, 120, 22 Pac. 349; *State v. Fulton*, 42 Kan. 164, 22 Pac. 378. And see, also, *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218, where the fraud and irregularities and other misconduct of election officers was deemed sufficient to justify a rejection of the entire returns.

The mere fact that there is a discrepancy between the number of votes declared, and the number checked, does not show sufficient fraud to justify the rejection of the entire vote: *Judkins v. Hill*, 50 N. H. 140. And the fact that ballots in the hands of the lawful custodian, after being voted, were changed in favor of such custodian, who is a candidate for office, will not invalidate the election, where he has a majority, after rejecting the altered ballots: *Windes v. Nelson*, 159 Mo. 51, 60 S. W. 129.

j. Effect of Bribery.

1. **In General.**—Where the question submitted at an election is the location of a county seat, the fact that one town or its citizens offer to donate money or other property to the county, if the county seat is located there, does not constitute such a case of bribery as will invalidate an election: *State v. Elting*, 29 Kan. 397; *State v. Malo*, 42 Kan. 54, 120, 22 Pac. 349. In this first case it was held that electors could properly consider these matters, and that it would not vitiate any vote cast in pursuance of such offer. But in *Berry v. Hull*, 6 N. Mex. 643, 30 Pac. 936, where one of the towns competing for the county seat was merely on paper and organized by a company for the purpose of securing such county seat, the giving of land to particular voters in consideration of their votes in favor of such town rendered such votes illegal, although the voters testified that the property was not given for that purpose, and that they were not influenced thereby. The entire election was not invalidated, however. Urging men to vote for the erection of a county building upon the ground that it would furnish them employment does not invalidate the election for corruption: *Board of Supervisors v. Circuit Judges*, 106 Mich. 166, 64 N. W. 42. Neither is it bribery, such as will avoid an election, to vote bonds to a railroad to the amount of

eighteen thousand dollars, for the railroad company to offer to receive only ten thousand dollars, instead of eighteen thousand dollars, if the election is favorable: *Chicago etc. R. R. Co. v. Ozark Township*, 46 Kan. 415, 26 Pac. 710.

2. Offer of Candidate to Donate Salary.—The rule appears to be firmly established that it is unlawful for a candidate for public office to make offers to voters to perform the duties of the office, if elected, for less than the legal fees. Such person is guilty of offering a bribe, and not only invalidates the votes influenced thereby, but disqualifies him from holding the office if otherwise legally elected, and his election is therefore void: *Carrothers v. Russell*, 53 Iowa, 346, 36 Am. Rep. 222, 5 N. W. 499; *State v. Collier*, 72 Mo. 13, 37 Am. Rep. 417; *State v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *People v. Thornton*, 60 How. Pr. 457, 25 Hun, 456. But if such a person has been declared elected, and has entered upon the duties of his office, he cannot be removed therefrom until after being convicted of such bribery: *State v. Humphries*, 74 Tex. 466, 12 S. W. 99.

k. Illegal Expenditures by Candidate.—Where a candidate for office is by statute prohibited from making expenditures for any but necessary and proper expenses, his election may be invalidated, and he may be ousted from office, if it is shown that he used money for corrupt and illegal purposes in procuring his election: *Commonwealth v. Walter*, 86 Pa. St. 15. But the mere fact that a candidate furnishes money to be used in the procurement of drinks of spirituous liquors for voters generally, with the intent to facilitate his election, where no elector is paid or promised anything for doing any act as an elector, is not such misconduct as will invalidate his election: *Moonlight v. Bond*, 17 Kan. 351. And where a candidate is permitted to spend one hundred dollars for necessary incidental expenses, and vouchers are not required for such expenditures in amounts less than five dollars, the election of a candidate will not be invalidated for stating a small aggregate sum of incidental expenditures of more than five dollars, without stating each small item for which no voucher would be required. Such trivial, unimportant, and limited violations of the statute, not arising from any want of good faith, are not ground for avoiding an election or forfeiting the office: *Land v. Clark*, 132 Cal. 673, 64 Pac. 1071.

1. Effect of Intimidation and Violence.—Where election officers honestly discharge their duty, and the mass of the voters are given a fair opportunity to cast their votes, a slight disturbance and casual fray at the polls is insufficient to vitiate an election: *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935. So mere noise, confusion, or threats will not usually have such an effect: *Roberts v. Calvert*, 98 N. C. 580, 4 S. E. 127. Neither will two breaches of the peace, there being no evidence of general intimidation: *Contested Elections of 1868*, 2 Brewst. 1. To affect the validity of an election on the ground that voters were deterred from voting by violence and intimidation, it should appear that the number deterred was sufficient to change

the result: *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935. Or that the true result was uncertain and could not be ascertained from the returns: *Patton v. Coates*, 41 Ark. 111; *Tarbox v. Sughrue*, 36 Kan. 225, 12 Pac. 935. But it is not necessary to show that a majority of the electors were actually prevented from voting or voted against their wishes; it is sufficient to show that wrongs against the freedom of election have prevailed, not slightly, and in individual cases, but generally, and to the extent of rendering the result doubtful: *Jones v. Glidewell*, 53 Ark. 161, 13 S. W. 723.

X. Count of Votes.

a. **Irregularities in General.**—It is not a sufficient irregularity to avoid an election that the election officers commenced to count the votes before the polls had closed, although the statute provided that they should be counted after the polls had closed: *Ex parte Williams*, 35 Tex. Cr. Rep. 75, 31 S. W. 653. Neither does the leaving of poll-books and ballots locked up, but not watched, and returning the next morning to count them, show sufficient misconduct to invalidate a return: *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505; for, while the postponing of the count of votes is conduct which should be severely condemned, especially where the statute requires an immediate canvass, yet it will not invalidate the election, although it should be subject to a rigid scrutiny: *People v. Sackett*, 14 Mich. 320; *Attorney General v. Glaser*, 102 Mich. 396, 61 N. W. 648, 64 N. W. 828. So the failure to proceed immediately with the count, and excluding all but two bystanders from the place where the votes were to be counted, will not vitiate the vote of the precinct where such misconduct occurs: *Atkinson v. Lorbeer*, 111 Cal. 419, 44 Pac. 162. Neither will the fact that the election officers after the close of the polls took the ballots to a room other than that in which the election was held, and there counted the votes, have such effect: *Behrensmeyer v. Kreitz*, 135 Ill. 591, 26 N. E. 704.

b. **Presence and Participation of Other than Officers.**—If the judges and inspector of an election cannot read, and for that reason a person who is not a member of the election board, nor a clerk, takes the ballots from the box and reads them to the tellers, at the invitation of the board, it is not such an irregularity as will vitiate the election of that precinct, if the result of the election is not thereby changed: *Sprague v. Norway*, 31 Cal. 173. So the fact that ballots were read and canvassed by the clerk of election, and not by the judges, will not invalidate the election: *State v. Bernier* (Minn.), 33 N. W. 368. Neither will the fact that other persons than the officers of election were permitted to participate in the count of votes vitiate an election, unless it appears affirmatively that the count was not correct: *Roberts v. Calvert*, 98 N. C. 580, 4 S. E. 127. And see *Boileau's Case*, 2 Pars. Eq. Cas. 503. And the fact that a candidate assists in the count of votes will only invalidate the votes which he counts for himself: *Grelle v. Pinney*, 62 Conn. 478, 26 Atl. 1106.

XI. Returns.

a. Irregularities in Returns.—Mere irregularities in the returns of an election are usually deemed immaterial: *Ex parte Towles*, 48 Tex. 413. The mere want of due authentication of returns will not vitiate an election. Such a defect can be remedied: *Rich v. Board of Canvassers*, 100 Mich. 453, 59 N. W. 181. And while it has been held that returns are not valid unless attested, yet there appears to be no reason why a return cannot be amended in this respect, and so the election will not be rendered void: *Questions by Governor Garcelon*, 70 Me. 560. The failure of the officers of election to sign the certificate required to be made on the stub-book will not vitiate a return, where duplicate certificates were properly made out and signed by all of the officers, and these constitute competent evidence of the correct returns: *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867. Where in the mailing of election returns in envelopes sealed with a little sealing wax and tightly tied together, the fact that the sealing wax became broken, and the envelope flaps were fastened by the postmaster with mucilage, will not justify a rejection of such returns, where the envelopes were not opened, and the ballots were not tampered with: *Hayes v. Kirkwood*, 136 Cal. 396, 69 Pac. 30. An irregularity in making out returns on separate pieces of paper, and without attaching them together in any manner, simply folding them together, and returning them to the county clerk in this form, will not invalidate such returns: *Privett v. Stevens*, 25 Kan. 275. Neither will the failure to write out in words at length the number of votes given, but using numerals instead, have such effect, though it is a departure from the provisions of the statute: *Rich v. Board of Canvassers*, 100 Mich. 453, 59 N. W. 181. Nor is the fact that returns contain unnecessary phrases a sufficient irregularity to invalidate them: *State v. Berg*, 76 Mo. 136. The failure or refusal of one of three election officers to sign a return does not vitiate the return: *State v. Board of State Canvassers*, 17 Fla. 29. So the transmission of returns to an officer not authorized to receive them is an irregularity which does not affect the result of an election: *Stockton v. Powell*, 29 Fla. 1, 10 South. 688; as is also a failure to deliver the ballots to the proper officer: *Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381.

Where the result of an election cannot be ascertained with certainty, or any approach to certainty, the return may be rejected: *Contested Elections of 1868*, 2 Brewst. 1; *Thompson v. Ewing*, 1 Brewst. 67. And when a return is so irregular, false, or fraudulent that the board of state canvassers is unable to determine the actual vote cast, the entire return may be rejected: *State v. State Canvassing Board*, 16 Fla. 17.

Where returns are shown to be false, one who has been declared elected must establish his title by other proof, or submit to a judgment of ouster: *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312.

b. Misconduct of Officers.—Mere official delinquency in sending in returns of an election will not invalidate such election: *Bourland*

v. Hildreth, 26 Cal. 161. So the failure to return the result of an election within the time prescribed by law will not justify the rejection of that poll: *Webre v. Wilton*, 29 La. Ann. 610. Neither will the rejection of a precinct vote be authorized by the failure to send the poll-book to the county clerk: *Day v. Kent*, 1 Or. 123; nor the failure to transmit with the returns any list of the qualified voters: *Taylor v. Taylor*, 10 Minn. 107; nor the failure to certify the number of unused ballots: *Graham v. Graham* (Ky.), 68 S. W. 1093; nor the failure to file tally papers: *Mann v. Cassidy*, 1 Brewst. 11; *Ewing v. Filley*, 43 Pa. St. 384; nor irregularity in signing tally sheets: *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325. And a failure of the county clerk to sign and certify to an abstract of the vote made by the election officers will not render the election invalid: *State v. Commissioners*, 42 Kan. 641, 22 Pac. 722. So is it an immaterial irregularity to add up the tally sheets instead of counting the polls, in ascertaining the result of an election: *Ex parte Williams*, 35 Tex. Cr. Rep. 75, 31 S. W. 653.

Misconduct of election officers which renders their return unreliable and unworthy of credence will avoid an election: *Thompson v. Ewing*, 1 Brewst. 67; *In re Duffy*, 4 Brewst. 531. So election returns cannot be counted if the irregular way in which they have been transmitted has resulted in their being changed since they were made out by the officer: *Fowler v. State*, 68 Tex. 30, 3 S. W. 255.

c. **Failure to Make Returns.**—Failure to make a return from certain voting precincts will not avoid an election, if the vote in such precincts, even if received, would not have changed the result: *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 185. To have any effect on the election it must be shown that the votes not returned would have changed the result: *Ex parte Heath*, 3 Hill, 42.

XII. Failure to Properly Preserve Ballots.

A mere mistake of precinct officers in destroying ballots after they have been counted and certified is not a sufficient irregularity to authorize the rejection of the vote of such precinct, the truth of the certificate of the officers not being questioned: *Hardin v. Cress* (Ky.), 68 S. W. 1090. So the accidental loss of the ballots and affidavits made at an election in a particular precinct affords no ground for rejecting the entire return from such precinct: *Beardstown v. Virginia*, 76 Ill. 34. And the failure to deliver the ballots, after being counted, to the proper officer, is no ground for setting aside an election, where it had no effect on the result of the election: *Ackerman v. Haenck*, 147 Ill. 514, 35 N. E. 381.

But where ballots cast at an election are not safely kept by the proper legal custodian, and are so exposed as to give an opportunity for tampering with them, they cannot be relied on in a contest as to the result of the election: *Powell v. Holman*, 50 Ark. 85, 6 S. W. 505.

XIII. Canvass of Returns.

a. Effect of Irregularities.—The duties of boards of election canvassers are ministerial, and their omissions or mistakes can have no controlling influence on the election: *People v. Van Cleve*, 1 Mich. 362, 53 Am. Dec. 69. So a failure to canvass returns will have no effect on an election, for they may be required to perform or complete such duty: *People v. Schiellein*, 95 N. Y. 124. And a failure of an officer to properly do his duty in canvassing a vote is no ground for vacating an election: *Ewing v. Duncan*, 81 Tex. 230, 16 S. W. 1000. Thus a failure of some of the judges to meet, and those who did meet, met at an unusual place, will not avoid an election: *Hulseman v. Rems*, 41 Pa. St. 396. Neither will the fact that the sheriff compared the polls at the county jail instead of at the courthouse have such effect: *Puckett v. Springfield*, 97 Tenn. 264, 37 S. W. 2; nor the fact that improper words were used in declaring the result of an election: *Graves v. Rudd* (Tex. Civ. App.), 65 S. W. 63.

WESTERN UNION TELEGRAPH COMPANY v. AYERS.

[131 Ala. 391, 31 South. 78.]

TELEGRAPH COMPANIES.—Damages for Mental Pain and Suffering are not recoverable by the sender of a telegraph message on account of the absence of the sendee resulting from the negligence of the carrier, where there does not exist between the sender, the sendee, and the person concerning whom the message is sent, that close degree of relationship from which natural love and affection are presumed. (p. 93.)

APPEALS.—Rulings Upon Motions to Strike Out Pleadings can be reviewed on appeal only when properly presented by a bill of exceptions. (p. 93.)

PRACTICE.—Where a Question is Properly Reserved on Objections to Evidence and requested instructions, no necessity exists for considering a ruling on a demurrer which raises the same question. (pp. 93, 94.)

Walker, Tillman, Campbell & Porter, for the appellant.

Ward & Drennen, contra.

393 DOWDELL, J. The appellee, H. L. Ayers, sued the appellant, Western Union Telegraph Company, for negligent failure to deliver a telegraphic message. In each count of the complaint mental anguish and suffering is laid as an element of damage. The message which was delivered to the appellant company for transmission was as follows: "Birmingham, Ala., Oct. 10, 1899. To W. H. Gill, Morris, Ala. Ina

not expected to live. Come at once. (Signed) H. L. Ayers." Ina, the person named in the message, was an infant daughter of H. L. Ayers. W. H. Gill, the person to whom the message was addressed, is the brother in law of H. L. Ayers and uncle of the said Ina. The message was not delivered to Gill in time for him to reach the home of appellee before the death of appellee's daughter Ina, which occurred about 10:48 P. M. of the day on which the message was sent. It is averred in the complaint that the mental pain and anguish suffered by the plaintiff, and for which damages are claimed, was on account of the absence of Gill from the bedside of plaintiff's daughter Ina, in her dying moments, and that this was caused by the negligence of the defendant in transmitting and delivering the telegram.

This is the first time, so far as we are advised, that the precise question here presented has been before this court. In all of the cases which have heretofore been considered by this court where damages for mental suffering have been claimed and allowed, on account of negligence in the transmission or delivery of telegraphic messages, there existed a relationship of the closest and most affectionate kind, such as husband and wife, parent and child, or brother and sister, between the sendee and the person concerning whom the message was sent, and, furthermore, generally the party suing being the one who was prevented by reason of the negligence complained of from being present at the deathbed or funeral of such deceased relative. In cases where the damages are claimed for mental pain and suffering by the ³⁹⁴ sender of the message on account of the absence of the sendee resulting from the negligence of the carrier, a like close and affectionate relation must exist between the sender, sendee and the person concerning whom the message is sent. That the father of Ina in the present case suffered great mental pain and anguish on account of her approaching death was most natural, and the law would presume as much, but how the absence of a brother in law on such occasion could add to the intensity of his anguish and mental suffering, or how a jury could determine such a question, is difficult to conceive or understand. We are unwilling to extend the doctrine of recoverable damages on account of mental pain and suffering to cases of this character, wherein there does not exist that close degree of relationship, such as parent and child, husband and wife, brother and sister, from which natural love and affection are presumed. To

do so would, in our judgment, tend to promote and encourage a species of litigation more or less speculative in its nature, and unjust and oppressive in its results. The weight of authority, as well as sound reason, seem to be against it, and we prefer to follow the doctrine as laid down upon this question in the following cases: *Western Union Tel. Co. v. Steenbergen*, 21 Ky. Law Rep. 1289, 54 S. W. 829; *Western Union Tel. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 869, 41 S. W. 469; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 30 S. W. 298; *Western Union Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. 649; *Western Union Tel. Co. v. Gibson* (Tex. Civ. App.), 39 S. W. 198; *Western Union Tel. Co. v. Brown*, 71 Tex. 723, 10 S. W. 323; *Morrow v. Western Union Tel. Co.*, 21 Ky. Law Rep. 1263, 54 S. W. 853—rather than that laid down in the case of the *Cashion v. Western Union Tel. Co.*, reported first in 123 N. C. 267, 31 S. E. 493, and again in 124 N. C. 459, 32 S. E. 746.

Rulings upon motions to strike pleadings can only be reviewed here when properly presented by bill of exceptions. The bill of exceptions in the present case contains no reference to the action of the court on motions to strike. Since the question we have considered was properly reserved on objections to evidence and by charges requested by the defendant, there exists no necessity ³⁹⁵ for considering the ruling on the demurrers by which it was sought to raise the same question: *Goldsmith v. Picard*, 27 Ala. 142.

The rulings of the trial court not being in conformity with the views above expressed, the judgment will be reversed and the cause remanded.

Damages for Mental Suffering in case of failure to send or deliver telegraphic messages are considered in the monographic notes, *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 788-790; *Western Union Tel. Co. v. Luck*, 66 Am. St. Rep. 873-875. In the close relations of life, such as husband and wife, parent and child, and brothers and sisters, tender ties of affection exist, and mental anguish may be presumed as a natural consequence when they are injuriously affected by the negligence of another; but such presumption is not made in the more distant relations of life, such as that of brother in law or friend. It must, then, be a matter of proof: Note to *Chappell v. Ellis*, 68 Am. St. Rep. 826.

SHADGETT v. PHILLIPS & CREW COMPANY.

[131 Ala. 478, 31 South. 20.]

INSURANCE.—The Recipient of a Gift is not Bound to Carry Out Her Donor's Contract to insure the property in favor of a conditional vendor, in the absence of any agreement on her part to do so, though the property in her hands is subject to the rights of the conditional vendor. (p. 96.)

A CONTRACT OF INSURANCE is Personal as between the insurer and the insured, and does not attach to or run with the title to the insured property on a transfer thereof. (p. 97.)

INSURANCE, Proceeds of.—Strangers to an Insurance Contract cannot acquire in their own right any interest in the insurance money except through an assignment or some contract with which they are connected. (p. 97.)

INSURANCE—Proceeds.—Where a Conditional Purchaser of Property or his vendee contracting to insure for the benefit of the conditional vendor, and in disregard thereof, insures in his own name, equity will establish a lien upon the proceeds of the policy in favor of the conditional vendor. (p. 97.)

Bill in equity claiming proceeds from a fire insurance policy. Phillips & Crew Company sold Shadgett a piano, the title to remain in the seller until all payments had been made, and in case of the destruction or damage of the piano, the loss to be borne by the vendee, who agreed to have the piano insured for the benefit of the vendor. Shadgett gave the piano to his wife, who had it insured for her benefit, her husband acting as her agent. The premiums were paid with her money. The evidence was conflicting as to whether she knew of her husband's obligation to insure for the benefit of the vendor. The piano was subsequently destroyed by fire. This bill asked for an injunction to prevent the insurance company from paying the proceeds of the policy to the wife, and that the money be paid to the vendor of the property. Decree for the complainant.

Espy & Farmer, for the appellant.

J. B. Dell, contra.

482 **SHARPE, J.** Unless the mere fact that Mrs. Shadgett received the piano as a gift from her husband, with knowledge of his obligation to insure it for complainant's benefit, placed her in the shoes of her husband with respect to that obligation, it is impossible to recognize any principle upon which complainant can claim the insurance money in

controversy. The contract of insurance was wholly between the defendant and the insurance company, and was personal in the sense that the money agreed to be paid in case of loss was not to stand in the place of the piano itself, but was a mere indemnity against the loss of defendant's interest therein. If her interest was small on account of encumbrances existing in favor of complainant, that fact was for the consideration only of the insurer and defendant, for complainant has no concern with the adjustment of the loss between them. We know of no principle either of law or equity which would bind defendant to carry out her donor's contract to insure in the absence of any agreement on her part to do so, even though the property in her hands was subject to complainant's rights therein as a conditional vendor.

In the case of *Miller v. Aldrich*, 31 Mich. 408, relied on for complainant, not only was there an agreement on the part of the mortgagor that mortgaged property should be kept insured by the mortgagor for the mortgagee's benefit, but a policy had been taken out accordingly, and thereafter the mortgagor sold the property, and his vendee, in conjunction with the mortgagor, procured a discontinuance of that policy and the issuance of another payable to the vendee alone. This was held to be a wrong to the mortgagee, in that it deprived him of that which had been already provided for his security, and to prevent such wrong the court of equity interposed by decreeing payment of the proceeds of the second insurance to the first mortgagor whose rights he had helped to displace. It is true it was said by ⁴⁸³ the court that the agreement with the mortgagee to insure for his benefit "was in equity a sort of adjunct to the mortgage, and was binding on Chapman [the mortgagor] and on all others in his shoes with notice." It was also said the vendee appears to have taken the place of the mortgagor, and to have occupied a position which required him to recognize and respect the terms of the agreement intended to fortify the mortgagee's security under the mortgage; but it was further said that instead of recognizing and respecting it he joined in the transaction to set aside and to so place himself that if the mortgaged property should burn he might put the mortgage money in his own pocket. Thus it seems to have been upon the vendor's participation in the displacement of a security already provided, rather than upon any contract obligation, that the proceeds were in that case held to inure to the mortgagee's benefit.

A contract for insurance made for the insurer's indemnity only, as where there is no agreement, express or implied, that it shall be for the benefit of a third person, does not attach to or run with the title to the insured property on a transfer thereof personal as between the insurer and the insured. In such case strangers to the contract cannot acquire in their own right any interest in the insurance money except through an assignment or some contract with which they are connected: *Vandergraff v. Medlock*, 3 Port. 389, 29 Am. Dec. 256; *May on Insurance*, sec. 449; *Carter v. Rockett*, 8 Paige, 436; *Dunlop v. Avery*, 89 N. Y. 592; *Nordyke etc. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683.

The foregoing and many other authorities recognize the doctrine that where a mortgagor has contracted to insure for the benefit of the mortgagee, or to pay to him the proceeds of a policy, and in disregard of the contract effects insurance in his own name and resists payment of the proceeds to the mortgagee, equity will, upon the principle of treating as done that which should have been done, establish a lien on such proceeds in favor of the mortgagee. It may be conceded that a conditional purchaser or his vendee contracting to ⁴⁸⁴ like effect for the conditional vendor's benefit would be liable to the enforcement of a similar equity, but here there was no undertaking on the part of Mrs. Shadgett to either insure for complainant's benefit or to assume her husband's obligation to so insure, and mere knowledge of that obligation did not impose it upon her.

The bill has not averments appropriate to present a case of fraud, and is without equity. It will be here dismissed, but without prejudice, and the decree appealed from will be reversed. Complainant will pay the costs in this court and in the chancery court.

Reversed and rendered.

A Policy of Insurance against loss by fire is, as a rule, a personal contract of indemnity between insurer and insured: Heller v. National Marine Bank, 89 Md. 602, 73 Am. St. Rep. 212, 43 Atl. 800; *Nordyke etc. Co. v. Gery*, 112 Ind. 535, 2 Am. St. Rep. 219, 13 N. E. 683.

Proceeds of Insurance.—If a mortgagor is bound to insure the premises for the security of the mortgagee, the latter has an equitable lien upon the money due on a policy taken out by and payable to the mortgagor: *Aetna Insurance Co. v. Thompson*, 68 N. H. 20, 73 Am. St. Rep. 552, 40 Atl. 396. As to the right to insurance money as between vendor and vendee, see *Skinner & Sons etc. Co. v. Houghton*, 92 Md. 68, 84 Am. St. Rep. 485, 48 Atl. 85.

Am. St. Rep., Vol. 90—7

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

PHOENIX INSURANCE COMPANY v. SCHWARTZ.

[115 Ga. 113, 41 S. E. 240.]

INSURANCE—Iron-safe Clause.—A clause in a fire insurance policy requiring the insured to keep the books and inventories of his business securely locked in a fire-proof safe at night, and at all times when the building containing the insured goods is not actually open for business, or to keep such books and inventories in some place not exposed to a fire which would destroy the building, does not apply to an interruption of business during business hours without closing the building caused by impending danger from fire in the neighborhood. In such case, however, the insured must exercise reasonable diligence to save his books and inventories. (pp. 99, 101.)

APPEAL.—Defects in Motion for New Trial caused by failure to properly assign grounds of error, are not cured by specifically incorporating such grounds in the bill of exceptions on appeal. (p. 101.)

M. P. Carroll, for the plaintiff in error.

J. R. Lamar and C. H. Cohen, for the defendant in error.

113 FISH, J. A policy of insurance, issued by the Phoenix Insurance Company, of Hartford, Connecticut, to Mrs. E. A. Schwartz, upon her stock of goods and merchandise, contained, among others, the following provisions: "The following covenant and warranty is hereby made a part of this policy: 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year; and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of the issuance of this policy, or this policy shall be null and void from such date; . . . 2. The assured shall keep a set of books which shall clearly and

plainly present a complete record of business transacted, including all purchases, ¹¹⁴ sales, and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and during the continuance of this policy; 3. The assured will keep such books and inventory, and also the last and preceding inventories, if such have been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured shall keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to present such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." Mrs. Schwartz's store was consumed by a fire which originated during business hours in another store on the same block. Her books and inventory were destroyed by the fire. They were not in the safe, but had been tied up in a bundle in anticipation of the possibility that the fire might spread to that store, and placed near the door so that they might be removed in case of danger. The company refused to pay the policy, on the ground of the failure of the assured to produce her books of account and inventories in accordance with the terms of the contract of insurance, and upon the further ground of noncompliance with the "iron-safe" clause of the policy, the provisions of which we have quoted. Mrs. Schwartz thereupon brought suit for the amount of the policy, together with damages and attorneys' fees. The defendant demurred to so much of the petition as sought to recover damages and attorneys' fees. This demurrer was overruled, and the case proceeded to trial, resulting in a verdict for the plaintiff for the full amount sued for, including six hundred and twenty-five dollars damages for bad faith on the part of the defendant company in refusing to pay the policy, and five hundred dollars as attorneys' fees; whereupon the defendant made a motion for a new trial, which the court refused. To the overruling of its demurrer, and to the refusal of the court to grant a new trial, the insurance company excepted.

1. The proper determination of the issues involved in the case before us depends largely upon the construction to be placed upon what is known as the "iron-safe" clause in the policy of insurance. It seems clear from the record that the plaintiff below had in her store at the time of the fire an iron

safe, which was open, and into ¹¹⁵ which the books and other records of the business could easily have been placed; that upon the approach of the fire, however, they were not placed in the safe, but were tied in a bundle and put conveniently at hand, so that they might be removed from the building in the event that the conflagration, which was then some distance away, should seem to threaten the safety of the store; that the fire spread much more rapidly than was expected, with the result that a wall of the building in which the plaintiff's store was located fell in, destroying her entire stock of merchandise; and that the books and inventory were not removed, but were destroyed with the building. It was the contention of counsel for the insurance company, as disclosed by their brief and the written requests for instructions to the jury, that upon the approach of the fire the plaintiff's store was no longer "open for business" within the meaning of the iron-safe clause of the policy; that it thereupon became the duty of the plaintiff to promptly place the books (which, up to that time, had been in use) in the safe, and that her failure to do this, resulting in her inability to produce the books and inventory for the inspection of the company, was a bar to her right to recover on the policy. We cannot, however, concede that this is a fair construction of the iron-safe clause. It is plain that on all ordinary occasions when her store was not open for business, such, for instance, as Sundays, holidays, and after the store had closed at night, the plaintiff was required by the clause in question to do one of two things: she must either have kept the books and inventories in her safe at the store, or else have removed them to some place where they would not be exposed to danger from fire. The clear intent of the clause is to guard against the possible destruction of these records during the absence from the store of those whose duty it was to look after them, and to that end it was provided that if the books were to be left in the store at night and on other occasions when business was not being transacted, they must be kept in an iron safe, which, presumably, was the most secure place for them in the store. But we see no warrant for the construction that this clause was intended to apply to occasions of actual impending danger from fire; nor are we aware of any rule for determining just when, under circumstances such as are disclosed by the record now under consideration, a store ceases to be "open for business." The fire took place during business hours, and it does not

appear ¹¹⁶ that the premises were ever actually closed. It was a time of great and sudden emergency, and as a matter of fact it is conceivable that the books might have been in greater danger from destruction, under the circumstances, in the iron safe than if removed to some place outside the store. Applied to the peculiar circumstances of the present case, we think that a fair interpretation of the iron-safe clause would be as follows: The insured was required to preserve, and in case of fire to produce, her books of account and inventories, the preservation of them being solely for the purposes of enabling her to produce them when required. On all ordinary occasions, when the store was not open for business, certain hard-and-fast rules were laid down to insure their preservation. In cases of sudden emergency, the insured must exercise all reasonable diligence to effect the main end of the iron-safe clause, viz., to put the books in a place of safety, so that they could be produced for the inspection of the company's agents after the fire. Whether such diligence required the placing of the books in the iron safe, or their removal from the building, and whether, in the present case, the plaintiff used such diligence, were questions of fact to be determined by the jury: See *Liverpool Ins. Co. v. Kearney* (Ind. Ter.), 46 S. W. 414, 27 Ins. L. J. 873; *East Texas Fire Ins. Co. v. Harris*, 7 Tex. Civ. App. 647, 25 S. W. 720, 23 Ins. L. J. 552.

2. Certain grounds of the motion for a new trial complain of portions of the judge's charge, and of various rulings upon the admission of evidence, but do not point out in what the alleged error consisted. Apparently, counsel for the plaintiff in error attempted to cure this defect in the motion by incorporating these grounds in the bill of exceptions and there specifically assigning error on each; but, under the ruling of this court in *Hill v. State*, 112 Ga. 32 (2), 37 S. E. 441, and the cases there cited, these assignments of error cannot now be considered.

3. Under the ruling of this court in the case of *Phoenix Ins. Co. v. Hart*, 112 Ga. 765, 38 S. E. 67, it is clear that the court erred in overruling the demurrer to so much of the plaintiff's petition as sought to recover damages and attorneys' fees under the Civil Code, section 2140. We accordingly reverse the judgment of the court below. Upon another hearing, it should be tried upon the line indicated in the first division of this opinion.

All the justices concurring, except Little and Lewis, JJ., absent.

Insurance.—On the force and effect of iron-safe clauses in policies of fire insurance, see *Hanover Fire Ins. Co. v. Crawford*, 121 Ala. 258, 77 Am. St. Rep. 55, 25 South. 912; *Southern Fire Ins. Co. v. Knight*, 111 Ga. 622, 78 Am. St. Rep. 216, 36 S. E. 821; *Mitchell v. Mississippi Home Ins. Co.*, 72 Miss. 53, 48 Am. St. Rep. 535, 18 South. 86.

BERRY v. JACKSON.

[115 Ga. 196, 41 S. E. 698.]

TROVER—**Election to Take Money Verdict.**—The sole issue in trover is the title to the property in dispute, and this is not affected by the fact that plaintiff elects to take a money verdict in lieu of the specific personalty claimed. (p. 103.)

BANKRUPTCY—**Discharge in as Defense to Trover.**—In trover, even if plaintiff elects to take a money verdict, the issue is solely one of title and not of debt, and neither the defendant nor his bail can set up as a defense the discharge of the defendant in bankruptcy pending the action of trover. (p. 103.)

W. H. Burwell, for the plaintiffs in error.

Hunt & Merritt, for the defendant in error.

197 LUMPKIN, P. J. An action of bail-trover was brought by Jackson against Berry, to recover possession of a horse. The defendant gave bond, and filed a plea in which he admitted the possession of the horse, but denied the plaintiff's right to a recovery. When the case was called for trial, he offered to file a special plea, in which he asked that the surety on his bond be made a party defendant to the case, and sought to set up in defense to the plaintiff's action a discharge in bankruptcy granted to him by the United States district court for the southern district of Georgia while the trover suit was pending. The court refused to pass an order making the surety a party, and the defendant then attempted to set up his discharge in bankruptcy, by way of amendment to his original plea. This amendment the court also refused to allow. The case proceeded to trial, and the plaintiff elected to take a money verdict for the damages alleged to have been sustained; whereupon the defendant renewed his request that

the surety be made a party, and his offer to amend his plea; both of which the court refused, on the ground that, "though plaintiff had elected to take a verdict for damages solely, the question at issue was still one of title, and could not be affected by the bankrupt proceedings." At the conclusion of the evidence the court directed a verdict for the plaintiff. The only question presented by the bill of exceptions is whether or not the court erred in rejecting the special plea and the amendment to which reference has been made. We have no hesitancy in deciding that the rulings of the court below were correct. The sole issue in the trial of an action of trover is that of title to the property in dispute; and the fact that the plaintiff may elect to take a money verdict in lieu of the specific personalty claimed can in no event alter that issue: *Campbell v. Trunnell*, 67 Ga. 518. Counsel for the plaintiff in error proceeds in his brief upon the assumption that the action was based upon a debt owed by Berry to Jackson, and argues that as such it was a claim from which he was relieved by his discharge in bankruptcy. But no such facts appear in the record. All that we have before us is an action of trover for the recovery of specific personal property, and, regardless of the election of the plaintiff to take a money verdict, the title to the property in dispute, which was the only issue for determination, could not be affected ¹⁹⁸ by any bankruptcy proceedings in which the defendant may have participated, especially as it nowhere appears, either in the special plea or the amendment to the original plea, that such proceedings were ever brought to the notice of the plaintiff. The only reason assigned for making the surety a party was that he might avail himself of whatever rights his principal acquired by virtue of his discharge in bankruptcy; and therefore what is here said in regard to the principal defendant below is equally applicable to his surety; and it follows that the judgment of the court below will not be disturbed.

Judgment affirmed.

All the justices concurring, except Little and Lewis, JJ., absent.

Trover.—That the title to the property in question is the thing at issue in actions for conversion, see *Gilman v. Gilby*, 8 N. Dak. 627, 73 Am. St. Rep. 791, 80 N. W. 889; *Tolman v. Waite*, 119 Mich. 341, 75 Am. St. Rep. 400, 78 N. W. 124; note to *Miller v. Hyde*, 42 Am. St. Rep. 433-435.

WILSON v. STATE.

[115 Ga. 206. 41 S. E. 696.]

PERJURY May be Assigned upon false testimony going to the credit of a witness. (p. 105.)

PERJURY—Indictment.—In a prosecution for perjury, it is essential to correctly describe, and accurately prove, the judicial proceeding in which the perjury is alleged to have been committed. It must be accurately described in the indictment and must be proved substantially as laid. (p. 106.)

PERJURY—Indictment—Variance.—An indictment for perjury, charging it to have been committed in a preliminary examination of one warrant against two persons, is not sustained by proof showing a preliminary examination of two warrants, one against each of two persons. The variance is fatal, although such persons are identical with those referred to in the joint case. (p. 107.)

W. E. Mann and W. H. O'Dell, for the plaintiff in error.

S. P. Maddox, solicitor general, for the defendant in error.

206 COBB, J. The accused was arraigned upon an indictment charging him with the offense of perjury. He demurred to the indictment, and his demurrer was overruled. The case went to trial, and resulted in a verdict finding the accused guilty. He brings the case here upon a bill of exceptions assigning error upon the **207** overruling of his demurrer, and upon the refusal of the court to grant his motion for a new trial.

1. The demurrer contains numerous grounds; but as only two of these grounds were insisted on in the brief of counsel for plaintiff in error, none of the other grounds will be considered. One of the grounds argued in the brief set up that the indictment was defective for the reason that it did not appear therefrom that the testimony of the accused which was alleged to be false was material to the issue under investigation in the trial in which the accused was sworn as a witness. The indictment alleged, in substance, that in the case of the state against R. E. Sloan and David Sloan, charged with the offense of arson, before S. B. Felker, a justice of the peace, the judicial proceeding being a preliminary investigation before such justice upon a warrant issued against the Sloans, the accused, after having been duly sworn as a witness, falsely testified that he had not on a day named made an affidavit before a notary public, such affidavit being set out in full in the indictment, and containing, in substance, averments that

the affiant knew of his own knowledge that the Sloans had burned the house and were guilty of the offense of arson as set forth in the warrant under which they had been arrested, and which was the foundation of the judicial proceeding then pending before Felker, the justice of the peace; the indictment concluding with the allegations that the accused, upon the trial of the Sloans, after a lawful oath had been administered to him, swore that he had not made the affidavit just referred to, when in truth and in fact he had made the affidavit and well knew this fact when he swore to the contrary.

In the preliminary trial before the justice of the peace, to determine whether the Sloans should be held to answer for the offense of arson, was the fact that the accused denied that he had made an affidavit which in effect charged that the Sloans were, within his own knowledge, guilty of the offense set forth in the warrant, material to the matter then under investigation—that is, whether the Sloans should be held to trial upon the charge of arson? One cannot be convicted of the crime of perjury unless the false testimony related to a matter material to the issue under investigation. In other words, falsely swearing to an immaterial matter is not an indictable offense. It is not, however, essential that the fact sworn to should be material to the main issue in the case, but it is sufficient if it ²⁰⁸ relates to an issue which is only collaterally involved: See *State v. Shupe*, 16 Iowa, 36, 85 Am. Dec. 485, and notes on page 493. If a witness is called in a case and testifies to a given state of facts, his credibility may be attacked by showing that on another occasion he had stated, or sworn to, an entirely different state of facts; that is to say, he may be impeached by proof of contradictory statements made as to matters relevant to his testimony at other times, either under oath or not under oath. Before he can be impeached in this way, however, it is necessary that his attention should be called to the time, place, and circumstances of the former statement; and if the statement was made in writing, it should be shown to him or read in his hearing: Civ. Code, sec. 5292. If he is called to testify to any material issue in the case, any matter relating to his credibility as a witness becomes collaterally material to the issue on trial; and being thus collaterally material, perjury may be assigned upon false testimony affecting the credibility of the witness: See the numerous cases cited in the notes to *State v. Shupe*, 85 Am. Dec. 493, 494. Mr. Bishop, in his work on Crim-

inal Law (volume 2 eighth edition) section 1032 (3) says: "The credit of a witness is always an element adapted to vary the result of the trial of a fact: therefore it is a collateral issue therein. And it is perjury to swear corruptly and falsely to anything affecting such credit: as, that he has not made a specified statement material in the case, that he has not expressed hostility to the defendant, that he has never been in prison." See also, *United States v. Landsberg*, 23 Fed. 585, and cases cited, where Benedict J., says: "The rule of the common law in regard to perjury is thus stated by Archibold: 'Every question in cross-examination, which goes to the witness' credit, is material for this purpose': Archibold's Criminal Pleading and Practice, Eng. ed., 817. The same rule was declared by the twelve judges in *Registrar v. Gibbons*, 9 Cox C. C. 105." In *People v. Courtney*, 94 N. Y. 491, 494, Andrews, J., said: "The recent cases sustain the view that perjury may be assigned upon false testimony going to the credit of a witness": Citing *Registrar v. Glover*, 9 Cox C. C. 501; *Reg. v. Lavey*, 3 Car. & K. 26. See, also, 2 Wharton's Criminal Law, 10th ed., secs. 1277, 1278; *Salmons v. Tait*, 31 Ga. 676.

The other objection raised by the demurrer to the indictment was that it did not appear therefrom that the oath was administered by Felker, the justice of the peace, or by anyone authorized ²⁰⁰ to administer an oath. It is unnecessary and it would be unprofitable to set forth the allegations of the indictment in full. It is sufficient to say that the indictment alleged that the accused was called as a witness in the trial of a case before Felker, a justice of the peace, that as such witness a lawful oath was administered to him, and that Felker, the justice of the peace, "had lawful power and authority to administer said oath." When this part of the indictment is construed as a whole, no other legitimate inference can be drawn therefrom than that Felker, the justice of the peace, administered the oath to the accused. There was no merit in this ground of the demurrer.

2. The indictment alleged that the judicial proceeding in which the accused was sworn as a witness was "the case of the state against R. E. Sloan and David Sloan," based on "a warrant" issued by Felker, a justice of the peace. This was an allegation in effect that there was only one case, which was founded upon one warrant and this warrant was issued against both of the Sloans—that is, it was a warrant charging

them jointly with the commission of the offense. The evidence upon the trial showed that the investigation before Felker, the justice of the peace, was upon two warrants, one against R. E. Sloan and the other against David Sloan. The allegation was one case against two persons, founded upon one warrant against two persons; the proof was two warrants, each being against one person only, and two cases, each against one person only. This was a fatal variance. The fact that the persons named in the two warrants were the same persons referred to in the allegations in the indictment in reference to one warrant, and the fact that the preliminary trial was had upon both warrants at the same time, does not affect the question at all. The allegation and the proof do not agree, no matter how we view it. In a prosecution for perjury, it is essential to correctly describe and accurately prove the judicial proceeding in which the perjury is alleged to have been committed. It must be accurately described in the indictment, and must be proved substantially as laid. That the judicial proceeding consisted of a criminal case against two persons is not proved, literally or in substance, by evidence showing two criminal cases, one against each of two persons, although such persons may be identical with those referred to in the joint case. In *Walker v. State*, 96 Ala. 53, 11 South. 401, it was held: "In a trial for perjury, where ²¹⁰ the indictment charges that the defendant falsely made an affidavit for a new trial in a civil action by one G. against him, an affidavit for a new trial in the case of G. et al. against him should not be admitted in evidence against the defendant's objection on the ground of variance." Walker, J., in the opinion says: "This evidence did not correspond with the allegation of the indictment as to the description of the proceeding in which the affidavit was made. A suit by Jacob Griel and others is not properly described as a suit by Jacob Griel alone. The proceeding alleged and the one proved are not identical. It cannot be affirmed that the case mentioned in the affidavit was the same as the one described in the indictment. The allegation of the indictment in this regard is material matter of description. It imports a suit in which there was but one plaintiff. The proof offered does not correspond with that description": See, also, in this connection, *Jacobs v. State*, 61 Ala. 448; *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108. The court erred in not granting a new trial

upon the ground that there was a fatal variance between the allegations and the proof.

Judgment reversed.

All the justices concurring, except Little and Lewis, JJ., absent.

Perjury may be Assigned upon testimony affecting the credibility of a witness: See the monographic note to *State v. Shupe*, 85 Am. Dec. 493, 494. The sufficiency of indictments for perjury is discussed in this note on pages 494, 495. See, also, *State v. Rowell*, 72 Vt. 28, 82 Am. St. Rep. 918, 47 Atl. 111.

ROBERTS v. ROBERTS.

[115 Ga. 259, 41 S. E. 616.]

JUDGES, Disqualification of.—A judge who is related within the fourth degree of consanguinity or affinity to counsel for an applicant for alimony and counsel fees in a divorce proceeding is disqualified from presiding in the case and passing upon such application, although such counsel may have a contract with the applicant binding her to pay them for their services, independently of the success of the application for alimony and counsel fees. (pp. 112, 114.)

APPELLATE PRACTICE.—The appellate court cannot hear evidence to impeach the truth of an affidavit filed for the purpose of relieving plaintiff in error from the payment of costs. (p. 115.)

Blance, Wright & Tisen, Fielder & Mundy, and King & Spaulding, for the plaintiff in error.

Janes & Hunt and Sanders & Davis, for the defendant in error.

²⁵⁹ COBB, J. Mrs. Donia Roberts filed her application for alimony against John R. Roberts. The judge passed an order granting alimony and counsel fees, and this judgment was reversed by this court, on the ground that the judge excluded evidence offered which should have been considered by him in determining the question: *Roberts v. Roberts*, 114 Ga. 590, 40 S. E. 702. When the application came on before Judge Janes for further consideration, counsel for respondent insisted that the judge was disqualified from presiding, for the reason that his brother, William Janes, Esq., was leading counsel for the applicant and his fee in the case was contingent upon recovery and would have to be paid by the re-

spondent. It appeared from ²⁶⁰ the evidence introduced before the judge, that his brother was leading counsel for the applicant, and that the firm of which he was a member had a contract with her by which it was to be paid one hundred dollars as fees in any event for services in the superior court in connection with the first hearing of the application, but that there was no agreement as to services rendered in the supreme court or in the second trial of the application in the superior court; that there was no arrangement made between the firm in question and associate counsel about the division of the one hundred dollars; that the application asked for three hundred dollars as counsel fees; that on the former hearing a judgment for one hundred and fifty dollars was obtained; and that counsel for the applicant expected to get pay for their services whether counsel fees were allowed on the application or not. The judge held that he was not disqualified to preside in the case, and postponed the hearing until a later day. When the case came on for a hearing again, objection was raised to the judge presiding, on the ground that he was related within the fourth degree of consanguinity to the wife of Colonel J. K. Davis who was of counsel for the applicant. The judge refused to admit evidence offered to show the fact of relationship set up in this objection, and that Colonel Davis' fee in the case was contingent, upon the sole ground that testimony on the subject of disqualification had been heard at a previous date. Counsel stated that they did not know of the relationship above mentioned before the day on which the objection was raised to the judge's presiding in the case. The judge held that he was not disqualified, and ordered the case to proceed, over the respondent's objection. After hearing evidence the judge passed an order requiring respondent to pay to the applicant one hundred and fifty dollars, as counsel fees and expenses, and fifteen dollars per month as temporary alimony. The respondent excepted, assigning error upon the ruling of the judge that he was not disqualified to preside in the case, and upon the order requiring him to pay alimony and counsel fees.

"It has been held that at common law the only ground for challenging a judge was personal interest or interest such as would disqualify a witness": 17 Am. & Eng. Ency. of Law, 2d ed., 733. Under this rule a judge would not be disqualified to sit in a case to which a relative was a party, and it has been so held, the doctrine being based on the ground that

favor will not be presumed in a judge; though there are cases holding that, even at common law, relationship ²⁶¹ to parties operated to disqualify a judge, or was at least sufficient ground for his retirement on his own motion: 17 Am. & Eng. Ency. of Law, 2d ed., 733. At common law, relationship to a party, either by consanguinity or affinity, was considered a ground of disqualification in a juror. Sir Edward Coke said that relationship in any degree was sufficient for this purpose, but later writers state that the relationship must be within the ninth degree, calculated according to the civil law rules: 17 Am. & Eng. Ency. of Law, 1124. The general rule seems to be that a juror will not be disqualified by the fact that he is related to one of the counsel in the case, even though it be the prosecuting attorney: 17 Am. & Eng. Ency. of Law, 1126. The common-law rule, which disqualifies a juror in a case where he is related to one of the parties, is of force in this state, both in civil and criminal cases: *Moody v. Griffin*, 65 Ga. 304; *Ledford v. State*, 75 Ga. 856. The Penal Code recognizes as a ground of challenge for cause that a juror "is so near of kindred to the prosecutor, or the accused, or the deceased, as to disqualify him by law from serving on the jury": Pen. Code, sec. 973 (4). See, in this connection, *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501. While there is nothing in the code which in terms provides what degree of consanguinity or affinity to the prosecutor, or the accused, or the deceased, or the person who was the victim of the crime, will disqualify a juror, in civil cases it has been uniformly held that relationship within the fourth degree to either party, or to a member of a corporation which is a party, would disqualify: See *Moore v. Farmers' Ins. Assn.*, 107 Ga. 199, 33 S. E. 65 (2), and cases cited. In *Ledford v. State*, 75 Ga. 856, Mr. Chief Justice Jackson says: "The juror was disqualified, being a third cousin and within the ninth degree." This statement by the chief justice that relationship within the ninth degree would disqualify, we suppose meant within the ninth degree as calculated by the rules of the civil law, and not by the rules of the canon law, which are of force in this state in reference to matters of inheritance. It has been held by this court that in determining the relationship of a party to a judge, in order to ascertain whether he is qualified to preside in the case, the rules of the canon law should be used: *Short v. Mathis*, 101 Ga. 287, 28 S. E. 918. It has been held that a juror was disqualified in a case where his half-brother

was interested in the result of the case although not a party to the record: *Beall v. Clark*, 71 Ga. 818. See, also, 17 Am. & Eng. Ency. of Law, 2d ed., 1125. In *Melson v. Dickson*, 63 Ga. 262 682, 36 Am. Rep. 128, it was held that a juror who would be incompetent if related to a party would be equally incompetent when related to an attorney whose fees were conditioned upon a recovery in the case. In the opinion Mr. Justice Jackson said: "Under the English law no such fees are allowed to counsel, and therefore kinsmen of the counsel are not incompetent jurors. Hence the dictum in *Bacon's Abridgment*: 5 *Bacon's Abridgment*, tit. 'Juries,' 354. But in our state the law is totally changed, and the reason and spirit of the dictum ceasing, it has no authority here. They were as much interested and as partial as if of kin to the plaintiff himself, if the fee were half the recovery, and probably it was; at all events, they were not omni exceptione majores if the fee were any part of the recovery and this it was proposed to prove": See, also, *Crockett v. McLendon*, 73 Ga. 86 (2), and cases cited.

It will thus be seen that at common law the judge was not disqualified by relationship to a party or to a person interested in the result of the case while a juror was. The common-law rule in reference to jurors has never been changed in this state, but has been steadfastly adhered to. The common-law rule in reference to the judge, which declared him disqualified only in a case where he was a party, or interested therein, seems to have been the rule in Georgia until the adoption of the Code of 1863: See *Cobb's Digest*, 460; *Clayton's Digest*, 39. By the provisions of that code no judge was permitted to sit in any case or proceeding in which he was pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor in which he had been of counsel, without the consent of all the parties at interest: Code 1863, sec. 199. These provisions of the Code of 1863 are now embodied in the Civil Code, section 4045, which contains a further ground of disqualification, where the judge has presided in a case in an inferior judicatory and his ruling or decision is the subject of review. Should the word "party," in the section of the code just referred to, be given the technical and narrow meaning of one who is a party to the record and absolutely bound by the judgment in the case? Or should that word be construed more liberally, and include any one who is pecuniarily interested in the result of the suit, although not a party

to the record and not necessarily bound by the judgment therein, notwithstanding he would be benefited by the judgment if rendered in a particular way? In considering a similar ²⁶³ statute, the supreme court of Texas construed the word "party" in its technical sense, and held that it did not include anyone except those who were parties to the record and bound by the judgment: *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768; *Knapp v. Campbell*, 14 Tex. Civ. App. 199, 36 S. W. 765. In referring to the subject of the disqualification of a judge, it is said in the *American and English Encyclopedia of Law*, volume 17, second edition, that the cases construing the various statutory provisions disqualifying for relationship to a "party" are not uniform, some confining their application to actual parties, while others are much broader in their construction. In the light of the rule which has been followed in this state with reference to a juror who is related to a person interested in the result of the suit, although not a party to the record, we think the proper construction to be placed upon the word "party" in the section of the code which declares when a judge shall be disqualified is the broad meaning which would include anyone pecuniarily interested in the result of the case, and not the narrow and technical meaning which would limit the rule to a person who was a party to the record.

The reasons at the foundation of the rule which forbid a juror from sitting in a case where he is related to some one pecuniarily interested in the result of the suit would also apply in the case of a judge who was in a similar situation. If one not a party to the record, but directly and pecuniarily interested in the result of the cause, would be such a party thereto as to disqualify one of his kinsmen from being a juror, he would also be such a party as to disqualify his kinsman from presiding as judge. Especially would the judge be disqualified in a proceeding where he presides, not only with the powers of a judge to determine the questions of law arising in the case, but with the powers of a jury to absolutely settle all disputed questions of fact, as is the case in an application for the allowance of temporary alimony and counsel fees, when one or more counsel for the applicant in whose behalf the fees are asked are related to the judge within the degree referred to in the statute declaring when a judge should be disqualified. It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did

not ask any allowance of counsel fees, of course the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The moment the applicant asks for counsel ²⁶⁴ fees her counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the counsel are as much parties to the case as if they were parties to the record. In *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, it appeared that a suit for divorce was brought by Sprayberry, as counsel for Mrs. Merk, against her husband, and that a bill in equity in aid of the divorce proceedings was also filed by him. The parties settled the controversy before final judgment, and the case was dismissed. It was held that the attorney had a right to bring a suit in his own name against the husband upon a quantum meruit for fees due the counsel for services in the case where he had represented the wife. In *Weaver v. Weaver*, 33 Ga. 172, a suit for divorce was brought, and there had been an order granting the wife temporary alimony and counsel fees. The libel for divorce was dismissed, and it was held that the effect of this dismissal was to rescind the order for alimony, but that the order for counsel fees was not rescinded, but counsel had a right to enforce the order as granted and was not driven to his action at law to recover the fees. These cases seem to show conclusively that, under the law of this state, fees which have accrued as the result of employment by the wife to bring an action for divorce, or have been allowed pending a suit for divorce or application for permanent alimony, absolutely belong to the counsel who rendered the services to the wife, and such counsel may, if necessary, enforce payment of the same by the husband through appropriate proceedings in their own name. The rule seems to be different in equity cases where counsel fees are allowed to a party who has brought a fund into court for distribution: *Morgan v. Fidelity Deposit Co.*, 101 Ga. 389, 28 S. E. 857; *Mohr-Weil Lumber Co. v. Russell*, 109 Ga. 579 (1), 34 S. E. 1005.

In an application for alimony and counsel fees the counsel for the applicant are thus not only pecuniarily interested in the result of the suit, but if counsel fees are allowed a judgment is obtained which is absolutely under their control, independently of anything which might be done by their client in reference to the main case, and which can be enforced for their benefit, certainly in the name of their client, even if the cases above referred to are not authority for the proposition that

it can be enforced in their own names. In such a case we do not think that a judge who is related within the fourth degree of consanguinity or affinity to any counsel for the applicant should preside. The reason and spirit of ²⁶⁵ the code section above referred to, as well as a proper construction of the word "party" therein contained, would disqualify a judge so situated from presiding in the case. In such a case the judge determines not only the question as to whether under the circumstances of the case counsel fees should be allowed, but he also determines the amount, the allowance of fees and the amount thereof being left under our law to his discretion: *Glenn v. Hill*, 50 Ga. 94; *Campbell v. Campbell*, 67 Ga. 423; *Rogers v. Rogers*, 103 Ga. 764 (3), 30 S. E. 659. If the ruling *Brantley v. Greer*, 71 Ga. 11, that a judge who is related within the fourth degree to an auditor is not disqualified from awarding him costs in the case, cannot be distinguished from the present case on the ground that the auditor's fees were a part of the necessary costs in the case and the auditor was as much an officer of the court as the clerk or the sheriff, and that the judge did not have to determine the question whether the auditor was entitled to any fees, that being fixed by his appointment as auditor, and only the amount of such fees was to be determined by the judge, what is said in that case will not be treated as binding authority, for the reason that it appears from the opinion of Mr. Justice Hall in terms that no question in reference to the rights of the auditor was before the court, and therefore whatever is said in the headnote and opinion on this subject is purely obiter.

It is said, however, that in the present case the judge should not have held himself disqualified, for the reason that it appeared that there was a contract entered into between the applicant and her original attorneys which fixed the amount which should be paid as counsel fees for services in the superior court, and she was to be bound for this amount in any event, whether counsel fees were allowed or not; and that the applicant was also bound for fees for additional services rendered during the progress of the case. We do not think this would relieve the disqualification of the judge. If counsel were satisfied to rely upon the contract with their client for compensation, they should not have applied for counsel fees to be paid by the respondent. If the applicant intends to pay her counsel from her own resources and the amount allowed by the court will go to her to reimburse her on account of what she has obli-

gated herself to pay, then counsel are still interested in the result of the case, for the reason that a judgment for counsel fees, no matter for what amount, whether larger or smaller than the amount ²⁶⁶ the applicant has bound herself to pay, is outstanding against the respondent; and as payment of such judgment could be enforced by an attachment for contempt, it is at least an additional security for the payment to counsel of the amount due them, so long as the amount agreed to be paid by the applicant remains unpaid. In any view of the case, counsel for the applicant are directly and pecuniarily interested in the result of the case, and we think the judge erred in holding that he was qualified to preside therein.

There was no merit in the motion to dismiss the writ of error. This motion was based upon two grounds: 1. That briefs had not been filed by counsel for plaintiff in error five days before the case was heard in this court, as required by the order of March 19, 1902; and 2. That the pauper affidavit filed by the plaintiff for the purpose of relieving himself from the payment of costs in the case was false. In reference to the first ground, the order referred to was not applicable to the present case; and if it had been, the failure to comply with the same would not have been ground for dismissing the writ of error. If counsel fail to comply with a rule of this court, the case cannot be dismissed, but the penalty for such violation shall be as for a contempt: Civ. Code, sec. 5568. In reference to the second ground, this court cannot hear evidence to impeach the truth of an affidavit filed for the purpose of relieving the plaintiff in error from the payment of costs: *Walker v. Bryant*, 112 Ga. 412, 37 S. E. 749.

Judgment reversed.

All the justices concurring, except Lewis, J., absent.

A Judge is Disqualified, by reason of relationship, from determining a cause, if he is related within the fourth degree to any person interested in the judgment or decree, though the latter is not a party of record: *Crook v. Newborg*, 124 Ala. 479, 82 Am. St. Rep. 190, 27 South. 432. See, also, *Fowler v. Brooks*, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417. "Who are Related by Affinity" is the subject of an extended note to *State v. Wall*, 79 Am. St. Rep. 200-205.

SAVANNAH, FLORIDA AND WESTERN RAILWAY
COMPANY v. EVANS.

[115 Ga. 315, 41 S. E. 631.]

NEGLIGENCE—Question for Jury.—The question as to what acts do or do not constitute negligence is exclusively for the jury, except when the particular act complained of is declared to be negligence by a statute or a valid municipal ordinance. (p. 117.)

NEGLIGENCE in Another State, when a Question for the Jury.—In an action to recover for a negligent act alleged to have been committed in another state, it is error for the court to instruct the jury what facts do or do not constitute negligence, in the absence of proof of a statute or valid municipal ordinance of such other state declaring such act to be negligence. The error is not cured by the fact that the charge is a literal extract from a decision by the court of last resort in the state where the act in question was committed. (p. 119.)

Chisholm & Clay, W. G. Charlton, and S. Mybrick, for the plaintiff in error.

Twiggs & Oliver, for the defendant in error.

315 COBB, J. The plaintiff brought suit against the railway company, in the city court of Savannah, for damages alleged to have resulted from the homicide of her husband. The petition alleged that the homicide occurred in the state of Florida, and was occasioned by the negligence of the servants and agents of the defendant. The trial resulted in a verdict in favor of the plaintiff, and the defendant complains that the court erred in refusing to grant her a new trial.

1. Error is assigned upon the following extracts from the charge of the court: 1. "It has been adjudged by the supreme court of **316** Florida to be gross negligence on the part of a railroad company to back a train without a brakeman at the rear, and across the main thoroughfare of a village, when there is no flagman at the crossing, even when the train is moving a little faster than a person walks"; 2. "You are instructed that while it was the duty of the plaintiff's husband, while upon, around, or crossing the railroad track of the defendant, to look out and listen for approaching trains with such care as an ordinarily prudent man would have used, yet that failure on his part to do so, if you find there was such failure on his part, was not such contributory negligence as would bar plaintiff's right of recovery, if you further find that the defendant, after seeing the plaintiff's husband, or after it should, in the exercise

of due care, have seen the plaintiff's husband on its tracks, or so near thereto as not to have space to pass safely, failed to exercise all proper measure to avoid the casualty"; 3. "By the law of Florida, if the defendant is at fault and the plaintiff is at fault, the plaintiff is entitled to recover, but the jury must diminish the damages in proportion to the fault attributable to the plaintiff. If it be true, as contended by the plaintiff, that the deceased, when injured, was crossing defendant's track, oblivious of the approach of a train, and a lookout stationed upon the rear of the car in the exercise of reasonable diligence, could and would have discovered the plaintiff's perilous situation in time to avert the collision by warning, application of brakes, or otherwise, then the failure to put a lookout on the rear of such train was negligence on defendant's part, contributing directly to the injury, and the plaintiff would be entitled to recover, the jury diminishing the damages in proportion to the default attributable to the deceased." The objection to the charges above set forth was, that the first and third stated what acts constituted negligence on the part of the defendant, and the second stated what would not amount to negligence on the part of the deceased. Under the law of this state, in the trial of cases of the character now under consideration, the question as to what acts do or do not constitute negligence is exclusively for determination by the jury, except in those cases where a particular act is declared to be negligence either by statute or by a valid ordinance of a municipal corporation: See *Atlanta etc. Ry. Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350, and cases cited; *Western etc. R. R. Co. v. Vaughan*, 113 Ga. 354, 38 S. E. 851.

317 While the present case, so far as the right of the plaintiff to recover and the measure of damages in the event of a recovery were concerned, was to be tried according to the law of the state of Florida, and on these subjects the courts of this state would apply the law of Florida in exactly the same way it would be applied if the case were pending in one of the courts of that state, our laws would of course control in reference to the procedure to be followed. It is immaterial, therefore, for us to consider what would be the practice under the law of Florida in such cases; whether it would be proper for the court to determine what acts would or would not constitute negligence, or whether these matters would be for determination by the jury under the practice prevailing in that state. In the case of *Massachusetts Benefit Life Assn. v. Robinson*, 104 Ga.

256, 286, 30 S. E. 918, 930, where it was contended that in the trial of an action upon a policy of life insurance, which, under its terms, was to be controlled by the law of Massachusetts, the materiality of misrepresentations made by the insured was a question of law, to be decided by the court, for the reason that this was the rule of force in Massachusetts, this court held that, notwithstanding such was the practice in that state, the courts of this state in enforcing a Massachusetts contract would be governed by the law of that state so far as the validity, form, and effect of the contract were concerned, but that in a matter affecting merely the remedy or procedure to be followed the laws of this state would control; and that therefore in such a case the materiality of misrepresentations would be a question for the jury, as that was the rule under the established practice in this state. It was in that case said: "These are questions which each state is entitled to decide for itself, and to that end erect tribunals and lay down rules of procedure therein. The law of Georgia can declare what questions shall be passed upon by the court and what questions shall be passed upon by the jury. Persons seeking either to enforce or defeat contracts made in another state with citizens of this state, when they sue or are sued in the courts of this state, have no right to say that the tribunal fixed by its laws is not satisfactory to them, and to demand a tribunal erected in accordance with the law of the state in which the contract is made." The principle of that ruling is applicable in a case like the present. The law of Georgia absolutely prohibits a judge from telling a jury what acts do or do not constitute negligence, ³¹⁸ unless the act has been declared by law to be negligence; and a person who brings a suit in a court of this state for a tort committed in another state, alleged to have resulted from the negligence of the defendant, must not complain if the practice and procedure of this state are required to be followed in the trial of his case, which he has voluntarily brought before our courts. If there were a statute of the state of Florida, or a valid municipal ordinance of the city where the homicide in the present case is alleged to have occurred, which in effect declared the acts referred to in the charges complained of to be negligence, then the judge in the trial of the case in this state would be authorized to tell the jury that such acts were negligence, just as he would be authorized to do if he were trying a case which arose in this state, where the act claimed to amount to negligence was made so either by a statute or a valid ordinance. It does not, however,

appear from the record that there was any statute of the state of Florida, or ordinance of the city in which the plaintiff's husband was killed, which declared either that the acts referred to as constituting negligence on the part of the defendant did amount to negligence, or that the act of the deceased referred to as not amounting to negligence did not have such effect. Such being the case, the charges complained of were erroneous for the reasons assigned. While some of the other charges excepted to may not have been subject to the objections made thereto, there were portions of the charge other than those above quoted which were subject to the criticism that they instructed the jury that certain acts did or did not constitute negligence.

2. Some of the charges which were complained of in the present case seem to be literal copies of headnotes made by the supreme court of Florida in a case decided by that court. It is claimed that it was not error to use the language of the Florida court, for the reason that the case was to be tried according to the law of Florida, and anything which was declared to be the law of that state by its court of last resort was a proper subject of instruction to the jury. This position is not sound. There are many things said by this court, both in headnotes and opinions, that are sound law, but which, nevertheless, would be improper instructions to a jury. This court, as well as the supreme court of Florida may use language which would be appropriate in a headnote or opinion, but ³¹⁹ which would be grossly improper when embodied in a charge to a jury: *Merritt v. State*, 107 Ga. 676 (4), 34 S. E. 361; *Florida etc. R. R. Co. v. Lucas*, 110 Ga. 127, 128, 35 S. E. 283. See, also, in this connection, *Eagle Mfg. Co. v. Browne*, 58 Ga. 240; *Hudson v. Hudson*, 90 Ga. 581, 586 (3), 16 S. E. 349.

3. Error was assigned upon certain portions of the charge, for the reason that they in effect instructed the jury that if the defendant was guilty of any negligence whatever, the plaintiff would be entitled to recover; it being contended that the effect of the instructions was to make the defendant liable, although the negligence proved was entirely disconnected with the transaction resulting in the death of the plaintiff's husband. While the language in one of the extracts from the charge to which exception is taken might be susceptible of this construction, and it would be well upon another trial not to use the exact expression therein contained, still these charges would not, in the light of the entire charge, have been sufficient to cause a reversal of the judgment denying a new trial. Error is assigned upon

the refusal of the court to give numerous requests to charge. Some of these requests were properly refused, because they did not contain correct propositions of law; and we will not undertake to determine whether the other requests should have been given or not, for the reason that upon another trial they may not be adjusted to the facts of the case. As to the assignments of error which took exceptions to the charge as a whole, which complained that the court refused to read to the jury certain portions of the petition in connection with this charge, and of certain failures to charge, as well of certain remarks made by the judge during the progress of the case, all that it is necessary to say is that probably these things will not occur upon another hearing, and it is unnecessary that further allusion should be made to them at this time. In reference to the charge on the subject of the measure of damages, the court seems to have followed substantially the language of the supreme court of Florida in the case of *Florida etc. Ry. Co. v. Foxworth*, 41 Fla. 1, 49 Am. St. Rep. 149, 25 South. 338. So far as the exception that the charge was not adjusted to the facts of the case is concerned, if any error was committed in this respect it will probably not be repeated at another trial.

Judgment reversed.

All the justices concurring, except Lewis, J., absent.

Negligence.—When the standard of negligence is not prescribed, and there is no combination of facts and circumstances relied upon to show negligence, the question becomes one of law only when those facts and circumstances are so decisive, one way or another, as to leave no reasonable doubt about it: *Kilpatrick v. Grand Trunk Ry. Co.*, 72 Vt. 263, 82 Am. St. Rep. 939, 47 Atl. 827. The question of negligence is for the jury when the facts are in dispute, or when they are indisputable, but different conclusions may be drawn therefrom: *Watson v. Portland etc. Ry. Co.*, 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699. But if the evidence is not in conflict, and but one reasonable inference can be drawn from the facts, the question is for the court: *Heimann v. Kinnare*, 190 Ill. 156, 83 Am. St. Rep. 123, 60 N. E. 215. And the nonperformance of a duty commanded by statute, resulting in injury, is negligence as a conclusion of law: *Chicago etc. R. R. Co. v. Mochell*, 193 Ill. 208, 86 Am. St. Rep. 318, 61 N. E. 1028.

HOWARD v. HUNTER.

[115 Ga. 357, 41 S. E. 638.]

AN UNATTESTED INDORSEMENT on the back of a will in the testator's handwriting, that "This will is made void by one of more recent date," does not constitute a revocation of the will so indorsed. (pp. 122, 123.)

WILLS—Revocation by Cancellation.—Notwithstanding the intention of the testator, he cannot revoke his will by cancellation, except by obliterating or canceling some material part thereof. (p. 123.)

WILLS—Revocation.—Notwithstanding the intention of the testator, he cannot revoke his will except by writing signed and attested in the manner provided for the execution of the will itself. (p. 123.)

H. McWhorter and Strickland & Green, for the plaintiffs in error.

S. H. Sibley and W. R. Mustin, for the defendant in error.

357 COBB, J. A paper purporting to be the last will of J. W. Howard was propounded for probate by the nominated executor, and certain persons, describing themselves as the heirs at law of Howard, filed their caveat objecting to the probate of the paper as a will, upon the ground that after the paper was executed Howard revoked the same, and that therefore it was not his last will. The case was carried by appeal to the superior court, and at the trial in that court the judge directed a verdict in favor of the propounder. The case is here upon a bill of exceptions filed by the caveators, complaining that the court erred in refusing to grant them a new trial. It appears from the evidence that the paper propounded as a will was executed with all the formalities required by law for the execution of wills. When offered in evidence it was objected to on the ground that it appeared from the paper itself that as a will it had been revoked by the testator, this objection being based on the following state of facts: The will was written on three of the pages of a double sheet of legal-cap paper, and signed on the third page. The attesting clause signed by the witnesses was near the close of the last page, the name of the last witness being on the **358** last fold of the paper when the same was folded up. Across the back of the paper on the last page, and over this last fold, were these words: "This will is made void by one of more recent date. J. W. Howard." Had this part of the paper been torn off as folded, the name of one of the witnesses

to the will would have been torn from the paper. Did this entry upon the will have the effect to revoke the same? The code declares that express revocation by written instrument must be executed with the same formality and attested by the same number of witnesses as are requisite for the execution of a will: Civ. Code, sec. 3342. It is apparent, therefore, that the entry upon the will cannot have the effect of an express written revocation, and this was practically conceded by counsel for the plaintiffs in error. It was contended that, although the entry would fail as a written revocation, it would nevertheless operate as a revocation, for the reason that it amounted to a cancellation of the will. A will may be revoked by destruction or obliteration done by the testator, or by his direction, with the intention to revoke, and an intention to revoke will be presumed from the cancellation or obliteration of a material portion of the will: Civ. Code, sec. 3343. In order for an obliteration or cancellation to be effective as a revocation, it is necessary that the obliteration or cancellation should be upon the will itself, and be of such a character as to indicate clearly that it is the intention of the testator that the paper should be no longer operative as a will. While the mere obliteration or cancellation of an immaterial part of the paper, such as the seal, will not, under the law of this state, raise any presumption of an intention to revoke, if any material part of the will is obliterated or marked, or words indicating an intention to revoke written across the same, a presumption of revocation will arise, and the instrument will be said to have been revoked as a will by cancellation. If, however, the paper be intact, and no material part of the same be obliterated, written across, or canceled in any way, the mere fact that there may appear words on some portion of the paper upon which the will is written, which would indicate an intention to revoke, will not have the effect of revoking the will, when the words are not written in such a way as to have the effect of obliterating or canceling or destroying any words of the will itself. A will may be revoked by a writing, or a will may be revoked by a cancellation. In each case an intention to revoke is necessary to complete revocation.

³⁵⁹ But even though the intention to revoke be present, a revocation will not result unless one of the methods prescribed in the statute is pursued. Even though there be an intention to revoke by cancellation, and this intention be plainly apparent, a revocation will still not result unless some material portion of the will is obliterated or canceled. And so if there be an in-

tention to revoke by written instrument, the will will not be revoked unless the writing be signed and attested in the manner provided for the execution of a will itself. In the present case, it is manifest that the testator had the intention to revoke. This intention was to revoke by written instrument, and the revocation fails for the reason that the writing was not signed in the presence of three witnesses in the manner provided in the statute. The writing cannot operate as a revocation by cancellation, for the reason that no material portion of the will is canceled or obliterated. We think this conclusion is demanded by the provisions of our code. The provisions of the code on the subject of revocation of wills are substantially the same as those of the English statute of frauds. In the case of Ladd's Will, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734, it was held, under a statute which contained provisions very similar to those in our code on the subject of revocation of wills by written instrument and cancellation, that where a will was written on the first page of a double sheet of paper, and the testatrix wrote upon the fourth page of the sheet the words, "I revoke this will," signing and dating the same, but such writing was not attested or subscribed by witnesses, the words did not take effect as a written revocation, nor did the same amount to a cancellation of the will. The conclusion just stated was reached in that case after an exhaustive examination of authorities which are collected together in the opinion of Mr. Justice Cassoday. In *Lewis v. Lewis*, 2 Watts & S. 455, it was held that the word "obsolete," written by a testator on the margin of his will, but not signed in the manner provided in the statute of Pennsylvania, did not operate as an express revocation of the will, nor amount to a cancellation of the same. In the case of *Warner v. Warner*, 37 Vt. 356, it was held that where a testator wrote his will mostly upon one side of a half sheet of foolscap paper, the signature and attestation clause being upon the other side of the same paper near the top, and two years afterward wrote below all the writing and near the middle of the sheet, "This will is hereby canceled and annulled in full, ³⁶⁰ this fifteenth day of March, 1859," this amounted to a revocation of the will by canceling. The ruling made in that case was said by Mr. Justice Cassoday, in the opinion in the case above referred to, to be "in opposition to the principles maintained by some of the best adjudicated cases," and attention was called to the fact that that decision was condemned by one of the ablest text-writers on the subject of wills: See 1 Redfield on Wills,

4th ed., *318. In the case of *Semmes v. Semmes*, 7 Har. & J. 388, which is sometimes cited as authority for the proposition that a written entry upon a will may have the effect to revoke the same as by cancellation, it appeared that there was not only a written entry upon the will indicating an intention to revoke, but a pen had been drawn across the signature of the testator and the names of the subscribing witnesses, which, of course, would have the effect of canceling the will independently of the entry upon the paper. As to the effect of drawing lines with a pen across words in a will, see *In re Kirkpatrick*, 22 N. J. Eq. 463; *In re Glass' Estate*, 14 Colo. App. 377, 60 Pac. 186. In the case of *Evans' Appeal*, 58 Pa. St. 238, where it was held that a will was canceled, in addition to the word "canceled" having been written upon the back of the will, the signature of the testator to a codicil was crossed out and the word "canceled" written under it, the signature of the testator appeared in two places in the original will, and one of these was crossed out by a line drawn through it and the date written under it, and the will itself was torn in two places. In *Witter v. Mott*, 2 Conn. 67, it was held that words expressive of an intention to revoke, written by a testator on the back of his will and signed, but not attested by three witnesses, operated as an express revocation of the will. There was, however, no statute in Connecticut requiring written revocations of wills to be signed in the presence of three witnesses. This case, of course, furnishes no authority, in view of our statute, for holding the entry on the will in the present case to be an express revocation in writing.

We have called attention to the cases from Vermont, Maryland, and Pennsylvania, for the reason that the two former were relied on by counsel for the plaintiff in error in the present case, and the latter is sometimes cited as authority for the proposition that there may be a cancellation of a will by an entry to that effect upon the paper, although such entry did not have the effect of obliterating³⁶¹ or canceling any material part of the will. The two latter cases are clearly distinguishable from the present case, for the reasons above stated. The Vermont case supports the contentions of counsel, but in our opinion that case is not sound, and, as has been shown above, it has met with adverse criticism at the hands of a learned text-writer as well as at the hands of a jurist of undoubted learning and ability: See, also, upon the subject of revocation of wills by cancellation, *Page on Wills*, secs. 244-

249; Schouler on Wills, 3d ed., sec. 419 et seq.; 1 Redfield on Wills, 4th ed., *318 et seq.; 1 Underhill on Wills, sec. 228 et seq.; Pritchard on Wills, sec. 262; Beach on Wills, sec. 55; 1 Jarman on Wills, 6th Am. ed. Big., *113 et seq.

Error is assigned upon the refusal of the judge to allow a witness to testify that, a few days before the death of the testator, he had arranged with him and two other witnesses to meet the testator at an appointed time and place for the purpose of witnessing the execution of a will; and in refusing to admit in evidence a paper purporting to be a will of J. W. Howard, which was unsigned. There was no error in either of the rulings complained of. The only purpose in introducing this evidence was to show an intention on the part of Howard to revoke the will which was propounded for probate. There was no question as to the fact that Howard had this intention. It was manifest from the entry upon the paper, and the controlling question in the present investigation was whether this intention had been carried into effect.

The judge did not err in any of the rulings complained of, nor in directing a verdict in favor of the propounder.

Judgment affirmed.

All the justices concurring, except Lewis, J., absent.

In the Case of Ortjen v. Ortjen, 115 Ga. 1004, 42 S. E. 387, it appeared that in the left-hand corner of the last sheet of paper upon which a will was written the testator had made an indorsement, signed and dated by himself, but without attesting witnesses, and without obliterating or canceling any material portion of the will, to the effect that "This, my will and testament, is of no avail, and is null and void." It was decided, upon the authority of the principal case, that such indorsement did not effect a revocation of the will, either by express revocation, or by cancellation.

Revocation of Will.—It has been insisted that the revocation of a will is effected by the testator writing upon it, "This will is hereby canceled and annulled in full." It would seem, however, that words expressing a purpose to cancel or annul a will cannot be permitted to have that effect, unless accompanied by the designated mode of execution and attestation: See the monographic note to *Graham v. Burch*, 28 Am. St. Rep. 350, 351.

BROWN v. JACOBS PHARMACY COMPANY.

[115 Ga. 429, 41 S. E. 553.]

CONSPIRACY—Combination in Trade, When Unlawful—Injunction.—A combination of dealers in certain merchandise to compel another dealer therein to sell at prices fixed by it, or, upon his refusal, to prevent its members, who are purchasing customers, from selling goods to him, is opposed to public policy and void. One or all of the members of such combination may be restrained from carrying into effect such purpose of the combination. (pp. 126, 149.)

CONSTITUTIONAL LAW.—Anti-trust Statutes, declaring that the provisions thereof "shall not apply to agricultural products or livestock while in the possession of the producer or raiser," are unconstitutional, as denying the equal protection of the laws of the state to all persons. (p. 150.)

King & Spaulding and Smith, Hammond & Smith, for the plaintiffs in error.

H. Douglas, Rosser & Carter, Hopkins & Sons, and Arnold & Arnold, for the defendant in error.

429 FISH, J. The record in this case discloses that, prior to the institution of the present action and since then there existed in the United States three organizations, known, respectively, as the Proprietary Association of America, the National Wholesale Druggists Association, and the National Association of Retail Druggists. These associations, occupying each toward the others close and intimate relations, had, among other things, the purpose of keeping up the prices of proprietary medicines, drugs, and other articles usually dealt in by those engaged in the drug trade. A local association was formed in Atlanta, known as the Atlanta Retail Druggists Association. When it was first organized, Joseph Jacobs, secretary and treasurer of the Jacobs Pharmacy Company, the plaintiff in the present case, was a member of it, but at that time it was distinctly understood and agreed among its members that it was to undertake no action with reference to the cutting of prices by dealers **430** in drugs, or to control prices of the same. Afterward the plaintiff, either by its methods of advertising, or certain things that it did in the conduct of its business, gave offense to the members of this association, and charges were preferred against Jacobs. He then withdrew from the local association. Some of the members of

that association were members of one or more of the large associations above referred to. After the retirement of Jacobs, the local concern put in operation a scheme to prevent the pharmacy company from being able to buy goods with which to conduct its business. The main features of that scheme were, that the local concern, by circulars, letters, or otherwise, undertook to notify wholesalers and manufacturers throughout the country that the pharmacy company was an aggressive cutter, and to request the persons or concerns addressed not to sell it any more goods; further, to require all salesmen representing the manufacturers or wholesale houses to procure from the local association a card, in order to procure which such salesmen had to sign an agreement not to sell the pharmacy company any goods; and another part of the scheme was to give the manufacturers and wholesalers to understand that, unless they refused to sell the plaintiff any goods, the members of the local association would not buy any more goods from them. In this condition of affairs the plaintiff brought its equitable petition against the defendants, alleging, in substance, the facts set forth above, and praying for damages for alleged injuries to its business already done, and for an injunction to prevent the defendants from carrying into effect the scheme above outlined. The petition charged that the scheme was an unlawful conspiracy to destroy the plaintiff's business; and it more fully set out the manner in which this scheme was to be effectuated, by setting forth, as exhibits marked "A," "B," and "C," certain letters, etc., by means of which the defendants were seeking to accomplish the alleged unlawful purpose which the plaintiff was seeking to restrain. These exhibits were as follows:

"EXHIBIT 'A.'"

"Atlanta, Ga., March 28, 1901.

"C. L. Stoney, President. W. B. Freeman, Vice-President.

"R. L. Palmer, Treasurer. W. S. Elkin, Jr., Secretary.

"Atlanta Druggists Association.

"Gentlemen: Inclosed please find a copy of a resolution recently adopted by the Atlanta Druggists Association. There are ⁴³¹ fifty-eight retail druggists and three wholesale druggists in this city, and among this number only one, a retailer, is designated as an aggressive cutter. Believing that from a business standpoint you would prefer the aid and support of

fifty-eight (two of the wholesalers are also retailers) legitimate druggists rather than that of one cutter, we feel sure that it will afford you pleasure to sign the enclosed agreement. Awaiting an early reply, I am

"Yours very truly,

"W. S. ELKIN,
"Secretary."

"EXHIBIT 'B.'"

"We, the undersigned, hereby agree to sell goods of our manufacture (or manufactured by any other house that we may handle) in the city of Atlanta, Georgia, and adjoining districts, only to those druggists who are members of the Atlanta Druggists Association, and any others who have not been designated as aggressive cutters. We further agree not to sell any goods to department stores in the above-mentioned territory. We reserve the right to cancel this contract by giving notice to the secretary of Atlanta Druggists Association. Date _____"

"EXHIBIT 'C.'"

"A copy of resolution adopted by the Atlanta Druggists Association, March 22, 1901.

"Resolved: 1. That the Atlanta Druggists Association adopt a card for salesmen reading:

"This is to certify that Mr. _____ representing _____ has qualified, and is hereby recommended to the members of our association.

"Date _____

_____,
"Secretary."

"(This card is only good for 30 days from date.)

"2. That salesmen's cards shall be required of all salesmen representing as follows: Drug jobbers, patent medicine manfrs., pharmaceutical houses, proprietary medicine manufacturers, druggist's sundry houses who carry patent and proprietary medicines, proprietary articles and medicated soaps, manufacturers of surgical supplies, and manufacturers of paper boxes and labels.

"3. That the secretary shall issue cards only to salesmen who sign an agreement not to sell directly or indirectly any aggressive cutter, or any department store. This agreement to be binding to house represented by salesmen signing same.

"4. That where new remedies are being introduced, the salesmen ⁴³² require each purchaser to sign contract to sell such remedy at full printed or implied price.

"5. That a copy of these resolutions be furnished each manufacturer who is requested to sign agreement."

The case was heard before Honorable J. H. Lumpkin, judge of the Atlanta circuit, upon the application for an interlocutory injunction. A considerable amount of evidence was introduced, concerning which it is sufficient to say that the plaintiff established, substantially, the material allegations of its petition. It claimed an injunction both upon the general principles of the common law and also under the terms of what is commonly known as the anti-trust act passed by the general assembly of this state in 1896. The defendants attacked the constitutionality of that act, alleging that it is in violation of the fourteenth amendment of the constitution of the United States, in that it denies to them the equal protection of the laws, and deprives them of liberty and property without due process of law, and also abridges their liberties and immunities as citizens of the United States; that it is class legislation and violates article 1, section 4, paragraph 1, of the constitution of Georgia. The judge granted the injunction substantially as prayed. After a careful investigation, we are satisfied that he was right in so doing, except in so far as it was made operative against the Lamar-Rankin Drug Company, one of the defendants, which was not a member of the local association mentioned above, and against which, therefore, no injunction should have been granted. This minor error or inadvertency has been corrected by an appropriate direction in the judgment rendered by this court. It would not be profitable to set out, or even summarize, the voluminous evidence which was introduced at the hearing. We have already, in effect, stated that the evidence was sufficient to establish favorably to the plaintiff its contentions of fact. We shall, therefore, confine our discussion to the questions of law involved in the present writ of error. Their nature will be gathered from what has already been said, and from an examination of the headnotes preceding this opinion. We have been relieved of much labor by reason of the fact that the learned and able judge of the trial court filed in the case an elaborate and carefully prepared opinion. What follows is taken almost literally from the same. We omit, save as to extracts from authorities made by him, the use of quotation

marks, for the sake of convenience, as we have seen fit to make some omissions, changes, and additions ⁴³³ as to the several propositions stated and discussed by his honor. It is but fair, however, to add that the material which we have rendered available was all supplied by the work done by the judge below.

A conspiracy has been defined as a combination either to accomplish an unlawful end, or to accomplish a lawful end by unlawful means. This form of expression was used by Lord Denman in *Rex v. Seward* (1834), 1 Ad. & E. 706; *Jones' Case* (1832), 4 Barn. & Adol. 345. And though he is reported to have expressed himself somewhat differently in other cases (see passing remark in *Reg. v. Peck* (1839), 9 Ad. & E. 686), this definition has been very widely accepted and quoted: See *Bouvier's Law Dictionary*, "Conspiracy." Mr. Eddy, in his recent work on Combinations, gives the following definition as comprehensive in its nature and including both civil and criminal conspiracies: "Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, or immoral; or (b) something that is not unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means; (c) something that is unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means": 1 Eddy on Combinations, secs. 171, 340. Conspiracies are often spoken of as civil or criminal. The terms "criminal" and "civil" are used respectively to designate a conspiracy which is indictable, or a conspiracy which will furnish ground for a civil action. To render a conspiracy indictable at common law, no overt acts in carrying out the design of the conspirators were necessary. The conspiring was sufficient to authorize an indictment. Yet it will be readily perceived that, if the conspirators stopped with conspiring, and did nothing further in execution of the design, no injury would have been done which would furnish a basis for a civil action. But if, in carrying out the design of the conspirators, overt acts were done, causing legal damage, the person damaged had a right of action: *Saville v. Roberts*, 1 Ld. Raym. 378. Hence arose the dictum that the gist of criminal conspiracy is the combination, and the gist of civil conspiracy is the injury or damage. And from this came certain rulings, applicable to the two respectively, which need not be discussed. Mr. Eddy says: "The law of civil conspiracy is a wider development and application of the law of criminal conspiracy. So far as rights and

remedies are concerned, all criminal conspiracies are embraced within civil conspiracies—the definition ⁴³⁴ of the latter embraces the former”: 1 Eddy on Combinations, sec. 364. That contracts and agreements in general restraint of trade are contrary to public policy and void is a principle so universally recognized that citation of authority is unnecessary to support it. It has been crystallized in the Civil Code of this state, section 3668, where the expression is that contracts “in general restraint of trade” are contrary to public policy. Differences of opinion arise only when this general principle is to be applied to a particular case. Thus it is suggested, inasmuch as the evidence shows that not all of the druggists of Atlanta are members of the local association, but only about three-fourths of them, that the combination or agreement was not obnoxious to this rule, or the rule declaring agreements or contracts tending to monopoly, against public policy, even if it would have been so were all members. We do not think this distinction sound. Nothing is more common than for the courts to declare contracts between only two persons, who by no means control a particular kind of business, void as contrary to public policy. It is the nature or character and tendency of the agreement which renders it objectionable, whether in fact the parties to it succeed in restraining trade generally, or stifling competition, or not. As to the matter of monopoly, it may also be said that if parties make contracts or agreements seeking to establish a monopoly, and do establish it as far as they can, surely they cannot say that the effort is legal if not completely successful.

In *More v. Bennett* (1892), 104 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888, it was held that an association of stenographers of which one object was to control the prices to be charged for stenographic work by its members, by restraining all competition between them, was an illegal combination, although only a small portion of the stenographers of the city belonged to it. In the opinion Bailey, J., says: “Contracts in partial restraint of trade which the law sustains are those which are entered into by a vendor of a business and its goodwill with his vendee, by which the vendor agrees not to engage in the same business within a limited territory, and the restraint, to be valid, must be no more than is reasonably necessary for the protection of the vendee in the enjoyment of the business purchased.” To this has sometimes been added agreements of partnership or employment. Mr. Tiedeman

says: "Following the reason of the rule which prohibits contracts in restraint of trade, we find that it is ⁴³⁵ made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition, or regulate the prices of commodities or services": Tiedeman on Commercial Paper, sec. 190. In *Anderson v. Jett* (1889), 88 Ky. 375, 12 S. W. 670, it was held: "Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it all along the line. . . . The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its evil character; but if its object be to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void as being against public policy": See, also, *Texas Standard Oil Co. v. Adoue* (1892), 83 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. 274; *People v. Sheldon*, 139 N. Y. 251, 263, 264, 36 Am. St. Rep. 690, 24 N. E. 785. Under such circumstances the agreement is void, although the prices fixed at the time may have been reasonable: *India Bagging Assn. v. Kock*, 14 La. Ann. 168.

Judge Taft, in the circuit court of appeals of the sixth circuit of the United States, in an able decision in the case of *United States v. Addyston etc. Co.*, 85 Fed. 271, reviews the authorities on this subject. Among other things he says (85 Fed. 283): "Much has been said in regard to the relaxing of the original strictness of the common law in declaring contracts in restraint of trade void, as conditions of civilization and public policy have changed, and the argument drawn therefrom is that the law now recognizes that competition may be so ruinous as to injure the public, and therefore that contracts made with a view to check such ruinous competition, and regulate prices, though in restraint of trade, and having no other purpose, will be upheld. We think this conclusion is unwarranted by the authorities, when all of them are considered. . . . The manifest danger in the administration of justice according to so shifting, vague, indeterminate a standard would seem to be a strong reason against adopting it." After considering a number of authorities, he says (page 290): "In the foregoing cases the only consideration of the agreement restraining the trade of one party was the agreement of the other to the same effect, and there was no relation of partnership, or of vendor and vendee, or of employer and employé.

Where such relation exists between the parties, as already stated, restraints are usually ⁴³⁶ enforceable, if commensurate only with the reasonable protection of the covenantee in respect to the main transactions affected by the contract. But in recent years, even the fact that the contract is one for the sale of property, or of business and goodwill, or for the making of a partnership or a corporation, has not saved it from invalidity, if it could be shown that it was only part of a plan to acquire all the property used in a business by one management with a view to establishing a monopoly. . . . Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly." This exactly answers one of the arguments advanced in the present case. It is contended that the members of the Atlanta Druggists Association were not seeking to restrain trade, or create any monopoly, but were only seeking to defend themselves against the cutting of prices by the Jacobs Pharmacy Company, and that really they were fighting an effort at monopoly. That fifty-eight druggists in the city of Atlanta should seriously claim to be in danger of a monopoly from one, which is not shown to have any more capital than any of them, or any more facilities for trade, or to be making any combination, or in fact doing anything to cause the present action on their part, except selling some articles of merchandise at low rates, is a position which cannot be sustained. This is the argument which is almost universally advanced by every monopoly or combination in restraint of trade. If it is sustained by the courts, then the rules of law as to such contracts and agreements might as well be wiped off the statute books.

The decision just cited was affirmed by the supreme court of the United States (in 1899), except as to one mere inadvertence in respect to interstate commerce. In the decision the following is quoted approvingly from the opinion of Judge Taft: "It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in 'pay' territory was reasonable. . . . We do not think the issue an important one, because, as already stated, we do not think that at common law

there is any question of reasonableness open to the courts with reference to such a contract. Its tendency ⁴³⁷ was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so": *Addyston etc. Co. v. United States*, 175 U. S. 211, 237, 20 Sup. Ct. Rep. 96, 106.

Again, some courts have sought to draw a distinction between what they term "necessaries" or "the necessities of life," or "prime necessities," and contracts or agreements with reference to other articles of commerce or merchandise. But this distinction is not well founded. What is at one time a luxury at another is a necessity. The things which were considered sufficient to satisfy the description of "necessaries" a few years ago would be considered wholly insufficient now, under present conditions of civilization. How useful must a thing become before it enters the catalogue of necessities, so that contracts to restrain trade in regard to it, or to foster a monopoly in it, are void? The unsoundness in principle of such a distinction was treated of by Judge Taft in the case of *Addyston Co.*, already referred to. But if it were sound, it may be of interest to consider some of the articles which have been held of such necessity. In a note to be found in the case of *Harding v. American Glucose Co.*, 74 Am. St. Rep. 268, 269, the following are set out as having been held of such necessity as to make a combination in regard to them illegal: beer, alcohol, distilling products, preserves, gas-pipes, powder, harrows, capsules, envelopes, wire cloth, bluestone, cigarettes, etc. Now, if these articles are to be ranked as necessities within the rule, it might as well be said at once that the rule applies to articles of merchandise generally.

The next position of the defendants, and the one which, on first presentation, seems to be their strongest defense on this part of the case, is that, at common law, contracts or agreements in general or unreasonable restraint of trade were merely void and unenforceable; that either party could defend against an action based on them; but that they were not illegal in such sense as to give a right of action to third parties. While there may be conflict among the authorities, it seems to us that some confusion might have been avoided by bearing in mind the distinction between a contract or agreement merely in restraint of trade as between the parties, and a combination or contract to stifle competition, or a conspiracy to ruin a competitor. Thus if one of two rival mer-

chants, not purchasing the business of the other, contracted with him that the latter should cease business and never enter mercantile pursuits at any time or place, the contract would be in general ⁴³⁸ restraint of trade, and void, and could not be enforced. But it alone would not give a right of action to third parties; and although the retiring from business of one of the merchants might lessen facilities for trading, and incidentally cause inconvenience, or even put it in the power of the other to raise his prices, the contract as such would merely be void. But, on the other hand, suppose that two merchants should agree that one should retire from business and that no other person should open a similar business, and if he did so, that the two would drive away his customers or break up his business by violence, threats, or like means, it would get beyond the domain of a mere nonenforceable contract into the domain of a conspiracy. Or suppose that a number of merchants should agree to fix the price of certain goods and not to sell below that price, if there were no statute on the subject, and the case rested on the common law, the agreement would simply be nonenforceable; but if they went further and agreed that, if any other merchant sold at a less price, they would force him to their terms or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere nonenforceable contract; and if in its execution damages proximately resulted to such other merchant, he would have a right of action. For two or more people to make an agreement which neither can enforce at law against the other is one thing; but to further agree, and under that agreement proceed to force another who is no party to it, against his will, to be governed by it, under penalty of financial ruin by driving off his customers, or the like, is, to use a favorite expression of former Chief Justice Warner, "another and quite a different thing." There is no inherent wrong in the mere act of firing a pistol in a place where not prohibited by law, but it may become very wrong if it is fired at the person or property of another, and may give a right of action to him for resulting injury. A combination, like a revolver, should not be aimed maliciously or with a reckless disregard of the rights of others.

Doremus v. Hennessy, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, was an action on the case for damages, on the ground that the members of an organization known as the Chicago Laundrymen's Association, had fixed

a scale of prices for laundry work, and had conspired to injure the plaintiff in her good name and credit, and to destroy her business, because she would not charge prices in accordance with such ⁴³⁹ scale, and they were proceeding to carry out the conspiracy. It was held actionable. The court said: "A combination by them to induce others not to deal with appellee or enter into contracts with her, or to do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full and free disposition of his own labor and capital, according to his own will, and anyone who invades that right without lawful cause or justification commits a legal wrong; and if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong. . . . An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607 (1899), was an action for damages. An association of granite manufacturers prohibited, by resolutions, sales by its members to persons engaged in cutting, quarrying, or polishing granite in the New England states, New York City, and Vermont, who were not members, which enumeration included plaintiffs. There was a by-law which prohibited dealing with members not in good standing, and imposed fines for the violation of its rules. The defense did not concede that such a by-law was more coercive than to attempt to compel by threats or intimidation persons not members of the association to withdraw their patronage from plaintiffs, but contended that the by-law was less objectionable, because applying to members only. The court held both to be alike unlawful. It said: "Without undertaking to designate with precision the lawful limit of organized effort, it may safely be affirmed that when the will of a majority of an organized body, in matters involving the rights of outside parties, is enforced upon its members by means of fines and penalties, the situation is essentially the same as when unity of action is secured among unorganized individuals by threats or intimidation. The withdrawal of patronage by concert of action, if legal in itself, becomes illegal when the concerted action is procured by coercion. . . . It is clear that if the association had comprised but a small portion of

the manufacturers, and had destroyed the plaintiff's business by compelling the manufacturers to join them in withholding patronage, the members would have been liable." In *Inter-Ocean Publishing Co. v. 440 Associated Press* (1900), 184 Ill. 438, 75 Am. St. Rep. 184, 56 N. E. 822, 826, an injunction was granted. The court said: "Competition can never be held hostile to public interests, and efforts to prevent competition by contract or otherwise can never be looked upon with favor by the courts." In *People v. Chicago Livestock Exchange*, 170 Ill. 556, 62 Am. St. Rep. 404, 48 N. E. 1062, it is said: "Efforts to prevent competition and to restrict individual efforts and freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions, and in violation of law." Similar language is used in the case last above cited. In *Beck v. Railway Teamsters' Prot. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13 (1898), an application for injunction was sustained. The court said: "The boycott condemned by the law is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and naturally tend to overcome by fear of loss of property the will of others, and compel them to do things which they would not do otherwise."

State v. Stewart, 59 Vt. 273, 59 Am. Rep. 710, 9 Atl. 559, arose on a demurrer to an indictment. In the opinion, Powers, J., said: "The reports, English and American, are full of illustrations of the doctrine that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy. Such combinations are equally illegal, whether they promote objects or adopt means that are per se indictable; or promote objects or adopt means that are per se oppressive, immoral, or wrongfully prejudicial to the rights of others. . . . The anathemas of a secret organization of men combined for the purpose of controlling the industry of others by a species of intimidation that works upon the mind rather than the body, are quite as dangerous, and generally altogether more effective, than acts of actual violence." In *Carew v. Rutherford*, 106 Mass. 1, 10, 8 Am. Rep. 287, Chapman, J., after giving various illustrations of actionable wrongs, says: "But as new methods

of doing injury to others are invented in modern times, the same principles must be applied to them, in order that peaceable citizens may be protected from being disturbed in the enjoyment of their rights and privileges, and existing forms of remedy must be used." ⁴⁴¹ In *Gatzow v. Buening* (1900), 106 Wis. 1, 80 Am. St. Rep. 17, 81 N. W. 1003, it was held that damages were recoverable. It is true that a contract had been made; but the decision was not put on that ground, but on the broader ground that the conduct of the defendants constituted an actionable conspiracy. Marshall, J., said: "This is an age of trusts and combinations of all sorts. There is clamor against them on the one hand, and for the privilege of combining upon the other, as if the law could be changed to fit the opinions and selfish ends of particular classes. There is clamor for laws to prevent combinations, while law exists that condemns most of them, which is as old as the common law itself, and sufficiently severe to remedy much of the mischiefs complained of that is actual; yet violations of such law are so common, and the remedy it furnishes so seldom applied, that its very existence seems in many quarters to be little understood. In *Regina v. Dutt*, 10 Cox C. C. 593, it was held that any combination of persons to stifle and prevent the free use of labor and capital within legitimate bounds is unlawful, and that the law furnishes a remedy therefor. The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents, and his industry, is as much the subject of the law's protection as is his body. A combination to do an act tending necessarily to oppress the public or oppress individuals by unjustly subjecting them to the power of the confederates and give effect to the purpose of the latter, whether of extortion or mischief, is unlawful: Bishop's Criminal Law, sec. 177; Desty's Criminal Law, sec. 2; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. Every agreement between two or more persons to accomplish a criminal or unlawful object, or a lawful object by criminal or unlawful means, is an unlawful conspiracy, and any person whose rights are injured by acts done in furtherance of such conspiracy has his action at law for redress in damages." In *Olive v. Van Patten* (1894), 7 Tex. Civ. App. 630, 25 S. W. 428, where a petition alleged that defendants, who were lumber dealers, had formed an association and sought to prevent sales by manufacturers or wholesale dealers to any person not a dealer, except a railroad, at

points where there was a dealer; that because of the refusal of the plaintiff—a sawmill owner and dealer who was not a member—to join such association and his exercising the right to sell to others than dealers, they had maliciously distributed circulars asking that patronage be withdrawn from the plaintiff until ⁴⁴² he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury, it was held to state a good cause of action for damages and injunction. In *Barr v. Essex Trades Council* (1896), 53 N. J. Eq. 101, 30 Atl. 881, an injunction was granted, and an able opinion filed by Green, V. C. In *Jackson v. Staneld* (1894), 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, it was held that a combination of retail lumber dealers to destroy the business of brokers and commission dealers who did not keep a lumber-yard with an assorted stock of lumber by coercing wholesale dealers to refuse to make sales to such brokers or lose the business of the members of such combination, was unlawful, and rendered a member who procured action by the association, to the injury of brokers, liable to the latter in damages; also that an injunction might be granted against enforcing an illegal agreement of dealers to injure the business of another person: See also, *Lucke v. Clothing Cutters etc.* (1893), 77 Md. 397, 39 Am. St. Rep. 421, 26 Atl. 505; Civ. Code, sec. 3807; *Witham v. Cohen*, 100 Ga. 670, 28 S. E. 505.

Courts and text-writers have not infrequently asserted that, as a general rule, a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action. But if this be advanced as a rule of universal application, it does not stand unchallenged. In *Bailey v. Master Plumbers' Assn.* (1899), 102 Tenn. 99, 117, 52 S. W. 853, 857, it is said: "It is entirely true, as in effect observed in *McCauley v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, and in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119, that, in the first instance, each member of the association had a perfect legal right to buy material and supplies exclusively from any dealer or dealers he might choose, and each dealer had an equal right to select members for his customers, and to confine his sales to them only. These were inherent rights, which no competitor was authorized to dispute, no court empowered to control or curtail. But, in our opinion, it does not follow from this undoubted freedom of individual member

and of individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they and all of them will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion. The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. ⁴⁴³ It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual rights and combined action in trade is seen in numerous cases. Any one of several commercial firms engaged in the sale of India cotton bagging had the right to suspend its sale for any time it saw fit. Yet an agreement between all of them to make no sales for three months without the consent of the majority 'was palpably and unequivocally a combination in restraint of trade': *India Bagging Assn. v. Kock*, 14 La. Ann. 164. Any one of several companies had the right to sell the whole or only a part of its output to only such persons, in only such territory, and at only such prices as it pleased, yet it was inimical to the interests of the public and unlawful for them to combine and agree that those matters should be determined and controlled by an agency jointly created for that purpose: *Arnot v. Pittston etc. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. The same was held to be true as to the individual company and the combined companies, respectively, in the *Sugar Trust Case*, previously cited, *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 19 N. Y. St. Rep. 853, and 7 N. Y. Supp. 406, 27 N. Y. St. Rep. 282. So one railroad company has the unquestioned right to charge reasonable rates for transportation, but it is not lawful for competing companies to mutually bind themselves to maintain those rates: *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, 17 Sup. Ct. Rep. 510; *United States v. Joint Traffic Assn.*, 171 U. S. 505, 19 Sup. Ct. Rep. 25. Individual boat proprietors may establish rules and rates for the conduct of their separate business, but the law does not allow them to form a combination, and by mutual agreement establish joint rules and rates: *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282. One

grain dealer is perfectly free to decide for himself what price he will offer for grain, but he is not allowed to enter into an agreement with the other grain dealers of his town, and thereby fix the price that all of them shall offer: *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171. A single brewer may fix his own price for the beer he sells. Nevertheless it is unlawful for an association of brewers to regulate the sales of its members: *Nester v. Continental Brewing Co.*, 161 Pa. St. 473, 41 Am. St. Rep. 894, 29 Atl. 102. Many other cases to the same effect in principle might easily be cited, were their citation deemed at all necessary."

Unquestionably any person who does not occupy a public or ⁴⁴⁴ quasi public position (like public officials, railroad companies, etc.), or whose property has not become impressed with any public or quasi public use (*Munn v. Illinois* (1876), 94 U. S. 113), may ordinarily deal with any other person at his option. It may also be conceded, at least for the sake of the argument, that ordinarily a number of persons may in concert decline to sell to or buy from another. Yet the facts of the present case go much further than that. Here there was a combination, not merely agreeing not to deal with the plaintiff, but undertaking also to drive off and prevent others from dealing with it, and seeking to ruin its business by destroying its power to purchase goods, unless it should submit to regulate its business or fix its prices as they desired. If the defendants as individuals, or in any way, claim to have the right to fix the prices at which they will sell, how can they claim that plaintiff has no such right as to its own business? In *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607, the supreme court of Vermont said that the view above referred to "would preclude a reliance upon an unlawful purpose, and require that the means used should be illegal. The agreeing together to effect an illegal purpose being itself illegal, it might seem that any act done in furtherance of the agreement, and resulting in damage, even though itself not a violation of right, would sustain a recovery. . . . If it be true, as a general proposition, that several may lawfully unite in doing to another's injury, even for the accomplishment of an unlawful purpose, whatever each has a right to do individually, it by no means follows that the combination may not be so brought about as to make its united action an unlawful means": See, also, *Barr v. Essex Trades Council* (1896), 53 N. J. Eq. 101, 30 Atl. 881; the strong opinion of Gibson, C. J., in

Commonwealth v. Carlisle, Bright, N. P. (Pa.) 36, 41 (quoted at some length in one of the opinions in *Knight's Case*, 156 U. S. 35, 15 Sup. Ct. Rep. 249); *State v. Geidden*, 55 Conn. 46, 75, 3 Am. St. Rep. 23, 8 Atl. 890; and cases cited in 1 *Eddy on Combinations*, sec. 360. Certain portions of the annual address (in 1899) of the president of the National Association of Retail Druggists, as published in the *American Druggist and Pharmaceutical Record*, were introduced in evidence, from which it appears that, in discussing the power of combination as compared with individual effort, he said: "Nature too forgets the individual always; to the species alone is it kind; in the general uplifting alone does it glory. So must it be with man. Man is of nature and must follow nature's bent. This tendency to associate, to unite, to combine, everywhere ⁴⁴⁵ present, strangely active, is as resistless as is yonder great Niagara. Attempt to oppose it and it spreads far and wide. Spreads with the opposing force, all the while accumulating power until everything, even the mightiest, is swept before its immensity." And yet, when such mighty power, like a torrent, is turned upon any individual who declines to join, or to do the bidding of those who direct the force, and to sell at prices dictated by them, for the purpose of crushing him and driving off those who would deal with him, under the threat that otherwise they will also be drowned in the resistless Niagara, shall courts of justice find no remedy? To protect the individual against encroachments upon his rights by greater power is one of the most sacred duties of courts. If there is any analogy between a combination of druggists to raise and maintain prices, and a biological species, the Darwinian theory is hardly a rule for a court in administering equity. In contrast with this idea, the following vigorous language of Mr. Justice Bradley in the *Slaughter-House Cases*, 16 Wall. 116, may be quoted: "For the liberty, preservation, exercise, and enjoyment of these rights [life, liberty, and the pursuit of happiness], the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a free man. This right to choose one's calling is an essential part of that liberty which it is the object of the government to protect, and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed." This occurs in a dissenting opinion it is true; but there was no difference among the members of the court as to the fact

that a man's business is his property, the difference being as to the application of certain amendments of the constitution of the United States.

It is generally held that if the injury is malicious, the person injured has a right of action. Indeed, it may be said that malicious injury to the business of another has long been held actionable: See *Barr v. Essex Trades Council* (1896), 53 N. J. Eq. 115, 116, 30 Atl. 881, and citations. In the case of *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 608—a case which will be referred to more fully presently—Lord Justice Bowen said: "Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other person's property or trade, is actionable if done ⁴⁴⁶ without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." The decision in *Barr v. Essex Trades Council* (1896), 53 N. J. Eq. 101, 30 Atl. 881, after citing this and other cases, proceeds: "When we speak in this connection of an act done with a malicious motive, it does not necessarily imply that the defendants were actuated in their proceedings by spite or malice against the complainant, Mr. Barr, in the sense that their motive was to injure him personally, but that they desired to injure him in his business in order to force him not to do what he had a perfect right to do. . . . If the injury which has been sustained, or which is threatened, is not only the natural but the inevitable consequence of the defendants' acts, it is without effect for them to disclaim the intention to injure. It is folly for a man who deliberately thrusts a firebrand into a rick of hay to declare, after it has been destroyed, that he did not intend to burn it. . . . The law, as a rule, presumes that a person intends the natural result of his acts; and this is true with reference to civil as well as criminal acts." Courts will look at the real substance of things, and do not stop at the mere form of words that may be employed: See *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 88.

We will now refer to some authorities cited by defendants. A leading case, in modern times, is the English case of *Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 608. It may not be amiss to give briefly its history. It was first heard on an application for injunction before Lord Chief Justice Coleridge and Lord Justice Fry in 1885. They held that a confederation or conspiracy by an association of shipowners, which was calculated to have and had the effect of driving the ships of other

merchants or owners, and those of plaintiffs in particular, out of a certain line of trade, even though the immediate and avowed objects were not to injure the plaintiffs, but to secure to the conspirators themselves a monopoly of the carrying trade between certain foreign ports and England, was or might be an indictable offense, and therefore actionable, if private and particular damage could be shown. But under the facts disclosed on that hearing, injunction *ad interim* was denied: *Mogul S. S. Co. v. McGregor etc. Co.*, L. R. 15 Q. B. D. 476. The case was afterward heard by Lord Chief Justice Coleridge without a jury, and he rendered judgment for the defendants, holding that the evidence failed to show an actionable conspiracy, as alleged, and that it showed only sharp competition ⁴⁴⁷ in business, including holding out inducements by rebates, advantages, etc., to those who would deal with defendants exclusively: *Mogul S. S. Co. v. McGregor etc. Co.* (1888), L. R. 21 Q. B. D. 544. He stated, however, that he had long doubted and hesitated in reaching this conclusion. In the court of appeal, the case was heard before Lord Esher, Master of the Rolls, and Bowen and Fry, L. JJ. Lord Esher was of opinion that the appeal should be allowed, but was overruled by the other two justices: *Mogul S. S. Co. v. McGregor etc. Co.* (1889), L. R. 23 Q. B. D. 598, 601. In the course of the opinion of Fry, L. J., which has been frequently cited in other cases, he says: "The ancient common law of this country, and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing, indicated the mind of the legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly. But early in the reign of George III, the mind of the legislature showed symptoms of change in this matter, and the penal statutes were repealed (12 George III, c. 71), and the common law was left to its unaided operations. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the commodities, had a tendency to discourage the growth and enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past; the indication of a new policy for the future. This new policy has been more clearly declared and acted upon in the present

reign; for the legislature has, by 7 & 8 Victoria, chapter 24, altered the common law by utterly abolishing the several offenses of badgering, forestalling, and regrating." He also says a reference to the statutes of 1871 and 1875, enlarging the power of combination among workmen and masters, is indicative of public policy in England at the time of the decision. (We will presently compare this with the public policy of this state.) The majority of the court of appeal found, as matter of fact, that the defendants were not engaged in a conspiracy or unlawful combination, and were not actuated by malice or ill-will toward plaintiff, and did not aim at any general injury to plaintiff's trade, the object being simply to divert the trade from plaintiff to defendants, and that the damage to be inflicted was to be strictly ⁴⁴⁸ limited by the gain which defendants desired to win for themselves; in other words, that it was a case of competition only. Of course, the loss which a rival may suffer from legitimate competition does not give a right of action. The case was carried to the house of lords, and the judgment of the majority was affirmed: *Mogul S. S. Co. v. McGregor* (1892), 61 L. J. R. 295; L. R. App. Cas. (1892) 25. (Very full extracts from these decisions are made in 1 Eddy on Combinations, sec. 249.) A careful consideration of the various decisions in this case will show that, in substance, it only held that where competition was lawful, even if sharp, and the acts complained of were adopted for the advancement of the defendants' own trade, there was no actionable conspiracy, although plaintiff may have sustained loss thereby. If this decision should be deemed adverse to the views here presented, it may be well to contrast the public policy of this state with that mentioned by Fry, L. J. Engrossing, forestalling, and regrating still stand in our code as criminal offenses, and the presiding judge is required to give the law in reference to these offenses specially in charge to the grand jury at each term of court: See Pen. Code, secs. 662, 846. Our state constitution declares that the legislature "shall have no power to authorize any corporation . . . to make any contract, or agreement whatever, with any such corporation [i. e., other corporations], which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void": Civ. Code, sec. 5800. See *Central R. R. Co. v. Collins*, 40 Ga. 583 (6), 629; *Western Union Tel. Co. v.*

American Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; *City of Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932. What was said arguendo in *State v. Central Ry. Co.*, 109 Ga. 722, 35 S. E. 37, to the effect that all combinations are not necessarily illegal, has no application to the facts of the present case. As has been shown above, in the light of the evidence, it is futile for these defendants to claim that they were merely resisting an attack on the part of the plaintiff.

The following are some of cases relied on by the defendants: *Herriman v. Menzies* (1896), 115 Cal. 16, 56 Am. St. Rep. 81, 44 Pac. 660, arose on an action to enforce an accounting, under an agreement for the formation of an association for doing the business of stevedores. It was held not to be illegal, though one provision included the fixing of prices to be charged by the members. There was no effort ⁴⁴⁹ to force others to charge such prices; and it was said in the decision that there was nothing to show that the members comprised more than an insignificant part of the trade in numbers or volume of business, or any such restriction "as to preclude fair competition with others engaged in the business." *Bowen v. Matheson*, 14 Allen, 499, will be found to have been decided on the idea of competition, but it is not a well-considered case, reviews none of the authorities (but one being cited), and decides only as to certain allegations on demurrer. It has been criticised by Mr. Eddy, whose book shows that he approached the subject without any prejudice against combinations: 1 Eddy on Combinations, sec. 571. Mr. Freeman, in his note to *Hardin v. American Glucose Co.*, 74 Am. St. Rep. 244, says: Massachusetts seems also to have gone astray on the question of illegal combinations, . . . having confused the doctrine relating to contracts in restraint of trade, and the doctrine against restrictions upon competition." *Longshore etc. Co. v. Howell* (1894), 26 Or. 527, 46 Am. St. Rep. 640, 38 Pac. 547, might be quoted as an authority for the plaintiff, except as to the necessity for injunction. The court says: "While conspiracy in itself is not an indictable offense under our law, all these authorities show conclusively that such a combination for the purpose of doing injury to the public or to individuals is per se wrongful. Civil consequences are not changed by reason of the fact that the combination is not made a statutory offense." When the court came to consider the question of the necessity shown for an injunction (there having been a demurrer), it said that "although it might be inferred that a boycott was pending,

they [certain notices] were not so positive nor so persistently and wickedly repeated and maintained as to authorize an injunction"; and again, "there is no such persistent, aggressive, and virulent boycott now in progress," etc. It would seem to be rather too stringent to limit equity jurisdiction by so many adjectives. But in the present case the injury is in progress and is still threatened. *McCauley v. Tierney* (1895), 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1, is another case relied on by defendants. If this decision is sound, it can only be on the idea that the defendants were seeking to obtain trade for themselves by saying, in effect: "If you deal with us, we will deal with you; if you deal with others, we will withdraw our patronage." Whether such an agreement was legally enforceable need not be discussed. There was no effort to compel or ⁴⁵⁰coerce others not members to be bound by their prices or views. If the decision in *Bohn Mfg. Co. v. Hollis*, 44 Minn. 223, 55 N. W. 1119, 40 Am. St. Rep. 319, can be sustained, it must be on the same idea. No compulsory measures seem to have been used to enforce obedience on members; nor does there appear to have been any effort to drive away from plaintiff other than those voluntarily acting together in concert, and no pressure on outsiders to maintain prices or incur ruin. In truth, however, some of what was said in that decision is unsound, and not in accord with cases already cited. It has been considerably criticised: See *Bailey v. Master Plumbers' Assn.* (1899), 103 Tenn. 99, 117, 52 S. W. 857; 1 *Eddy on Combinations*, sec. 560, p. 476, note; *Jackson v. Stanfield* (1894), 137 Ind. 592, 36 N. E. 345, 37 N. E. 14. *Cote v. Murphy* (1894), 159 Pa. St. 420, 39 Am. St. Rep. 686, 28 Atl. 191, and *Buchanan v. Kerr*, 159 Pa. St. 433, 28 Atl. 195, following it, held that where employes had entered into a combination to control by artificial means the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is not unlawful, since it is not made to lower the price of labor as regulated by supply and demand. Certain Pennsylvania statutes were also considered as indicative of public policy on the line of combining to meet combination. The strong statement of *Gibson, C. J.*, in regard to conspiracies (*Commonwealth v. Carlisle, Bright*, N. P. 40) is cited with approval.

In *Payne v. Western etc. R. R. Co.* (1884), 13 Lea, 507, 49 Am. Rep. 666, there was no question of combination or conspiracy at all; and the supreme court of the same state rendered

the decision in the later case of *Bailey*, already referred to. *John D. Park etc. Co. v. National Wholesale etc. Assn.* (1900), 50 N. Y. Supp. 1064, is cited. We must leave to the honorable courts of that state to reconcile that decision with the principle ruled in *John D. Park etc. Co. v. National Wholesale Druggists Assn.*, 50 N. Y. Supp. 1064, where (as quoted in 1 Eddy on Combinations, sec. 330, p. 213) it was held: "It is in restraint of trade and unlawful for a manufacturer to become a party to a combination which shall prevent any of his customers from obtaining other goods of other manufacturers because those customers violate the agreement with him in respect to the cutting of prices"; and also with *People v. Sheldon*, 139 N. Y. 251, 36 Am. St. Rep. 690, 24 N. E. 785. It seems, too, that in some cases in New York and elsewhere an idea has arisen of determining how much competition is desirable, and apparently of holding that extreme competition is undesirable,⁴⁵¹ and a combination to meet it is not unlawful. The fallacy of such a standard is clearly shown by Judge Taft in *United States v. Addyston Co.*, 85 Fed. 271, and Mr. Freeman in his note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 244. *Brewster v. Miller* (1897), 101 Ky. 368, 41 S. W. 301, held that an association of undertakers might lawfully agree to decline to render service in their business to one who had refused to pay a bill to some member of the association for similar services previously rendered. Here, also, there was no effort to compel persons not members to uphold the prices or obey the dictates of the association, or to coerce members or others; but only a voluntary, united refusal to serve a person who would not pay for similar services. *Continental Ins. Co. v. Board of Underwriters*, 67 Fed. 310, sought to follow the decision in the *Mogul Steamship* case, and held that the acts there complained of were for the purpose of competition, and not maliciously done. Here again there was no effort to drive out of business companies not members, further than nonintercourse and not having the same agents. So far as the enforcing of these provisions by a penalty is concerned, the decision is in conflict with *Boutwell v. Marr*, 71 Vt. 1, 76 Am. St. Rep. 746, 42 Atl. 607.

Finally, was the plaintiff entitled to an injunction? The usual grounds for the grant of an injunction in such cases are: 1. An injury which threatens irreparable damage; or 2. A continuing injury when the legal remedy therefor may involve a multiplicity of suits. "The difficulty of satisfactorily estimat-

ing damages to business is frequently recognized in applying those principles to suits relating to good-will, trademarks, patent rights and copyrights: 3 Pomeroy's Equity Jurisprudence, secs. 1352, 1354"; Barr v. Essex Trades Council, 53 N. J. Eq. 126, 30 Atl. 881 et seq., and authorities cited. Mr. Eddy says: "An injury is irreparable when the damage cannot be measured by any known pecuniary standard. The destruction of, or even injury to, a growing business cannot very well be measured in damages, since it is difficult, if not impossible, to lay down any rule whereby a jury can definitely ascertain the damages inflicted; the owner of the business himself probably could not estimate his loss, and yet the loss would be beyond dispute": Citing authorities; 2 Eddy on Combinations, secs. 1014, 1024, 1026, pp. 1161, 1169, 1170; Blindell v. Hogan, 54 Fed. 40, affirmed on appeal, 56 Fed. 696. Several of the cases already cited arose upon applications for injunction and apply to this feature of the case. It is urged that the plaintiff was ⁴⁵² not entitled to equitable relief, because it did not come into a court of equity "with clean hands." The specific claim of uncleanness is that, on some occasions, it sold one drug or mixture instead of, or purporting to be, another. This is denied. If it were true, it would be no defense to this case. If it is undertaken to coerce a dealer not to sell at reduced prices, and is sought unlawfully to destroy its business if it does so, an application by it for injunction is not successfully met by saying that it sold some spurious goods, or misrepresented some to customers in certain sales. It was money, not morals, that moved the defendants in their conduct toward it for cutting prices. The doctrine that a suitor must enter a court of equity "with clean hands" has reference to the transaction complained of by him: Ansley v. Wilson, 50 Ga. 425. If plaintiff sells adulterated drugs, it and its officers are liable to punishment under the criminal law: Pen. Code, secs. 483, 484.

The learned judge did not err in holding that the defendants who are members of the Atlanta Druggists Association, in the name of such association or otherwise, should be enjoined from sending out to wholesale druggists or proprietors of proprietary medicines through the mails, or delivering them to them otherwise, the letter and agreement set out in exhibits "A" and "B" to plaintiff's petition, or seeking to cause the latter to be signed by means of the letter set out in exhibit "A," or other like means, or sending out any letter, circular, or agreement of similar character or purpose, directly or indirectly, to wholesalers, jobbers, or proprietors; and from issuing to salesmen

and causing to be signed the card agreement attached to the petition as exhibit "C," or any card or agreement of similar import or purpose; and from in any manner threatening or seeking to intimidate wholesalers or proprietors, and so prevent them from selling to plaintiff as a cutter or aggressive cutter; and from conspiring and from seeking to prevent wholesale or other druggists from dealing with or selling to plaintiff, by direct or indirect threats of cutting off their means of obtaining goods or merchandise, or of causing such means to be cut off, or of causing them injury or loss of custom if they should deal with or supply the plaintiff; and from taking part in or carrying out any conspiracy or combination for that purpose; and from designating or pointing out the plaintiff to other druggists associations or their representatives as an aggressive cutter, and from writing or sending ⁴⁵³ through the mails any card, circular, letter, or other written or printed communication conveying, or intending to convey, to proprietors or wholesalers throughout the United States that plaintiff is an aggressive cutter and under the ban of the local organization, or of similar import.

2. The learned trial judge based his judgment, in part, upon the act of the general assembly approved December 23, 1896 (Acts 1896, p. 68), commonly known as the "anti-trust act." The defendants in the court below attacked the constitutionality of this act, and one of the exceptions to the judgment is that the court erred in holding it to be constitutional. Since this case was heard and determined in the lower court and argued here, the supreme court of the United States, in a decision rendered March 10, 1902, in the case of *Connolly v. Union Sewer Pipe Co.*, 181 U. S. 540, 22 Sup. Ct. Rep. 431, held the anti-trust statute of Illinois, which contained a provision that it should "not apply to agricultural products or livestock in the hands of the producer or raiser," to be repugnant to the provisions of the fourteenth amendment of the constitution of the United States, because it denied the equal protection of the laws of that state to those within its jurisdiction who were not producers of agricultural products or raisers of livestock. The "anti-trust act" of this state, above referred to, exempts from its operation "agricultural products or livestock while in the possession of the producer or raiser." Consequently, under the decision of the supreme court of the United States, we are constrained to hold that this exemption renders the act unconstitutional. As will have been seen, however, the judg-

ment of the court was right, irrespective of the provisions of this act.

3. Certain assignments of error in the bill of exceptions complain, in effect, that the injunction was too broad, because it was operative upon the individual members of the association to which the defendants belonged, and therefore had the effect of cutting them off from the exercise of individual rights which it was their privilege to exercise, provided there was no unlawful conspiracy. The reply to this is, that the judge found there was a conspiracy. He could not enjoin the combination in the abstract, but, to render any effective protection to the plaintiff, was obliged to enjoin the individual members of the association from doing the unlawful acts which they had conspired to do and were actually doing when the ⁴⁵⁴ petition was filed. It was the only possible way in which to make the writ of injunction of any avail. The defendants could not, fresh from the conspiracy and inspired by the purposes thereof, fail to injure the plaintiff, if allowed to continue their unlawful acts under the guise of doing so upon their individual responsibility.

Judgment affirmed, with direction.

All the justices concurring, except Lewis, J., absent.

Unlawful Trusts and Monopolies are considered in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. A combination in business, not in the free competition of trade, nor for the sole benefit of the business, but to induce the withdrawal of custom from another for the purpose of wantonly injuring him, is actionable as an unlawful conspiracy: *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, and see the cases cited in the cross-reference note thereto.

GAY v. WARREN.

[115 Ga. 733, 42 S. E. 86.]

JUDICIAL SALES—**Title Deeds.**—A purchaser at judicial sale gets no title or right to the deeds constituting the chain of title of the person whose property is sold. (p. 153.)

Howard & Armistead and E. D. Graham, for the plaintiff in error.

Griner & Baldwin and J. K. Hines, for the defendant in error.

⁷³³ **SIMMONS**, C. J. A considerable quantity of land was owned by John Gay in Laurens county. He died leaving C.

M. Gay as one of his executors. Shortly after the latter qualified, disputes arose between him and the other heirs at law. A receiver was appointed to take charge of the estate. It seems that the receiver obtained an order of court to sell certain of the lands of the estate. Warren became the purchaser of one of the lots so sold. After some years he brought an action of trover against C. M. Gay, to recover two deeds constituting part of the chain of title of John Gay. On the trial much evidence was introduced on the question as to whether C. M. Gay was in possession, at any time, of the deeds sought ⁷³⁴ to be recovered; also evidence as to the value of the lot purchased by Warren, and some evidence as to the damage he had sustained by reason of his not having the deeds. It seems that Warren owned the land at the time suit was brought, but had, pending the litigation, sold it to his son. The plaintiff having elected to take a money verdict, the jury found in his favor for six hundred dollars, which was but little less than the value of the land. The defendant moved for a new trial. The motion was overruled, and he excepted.

Where a plaintiff brings an action of trover, he must show title in himself, or that he has the right of possession. If he fails to do so, he cannot recover. Trover will lie for the recovery of title deeds, but the plaintiff must show that he has a right to them before he can recover. The back deeds, constituting the chain of title of one whose lands are sold under judicial process, do not, we think, belong to the purchaser at the sale. If one holding land under a single deed sells it in parts to a number of purchasers, he would of course be unable to furnish each with his chain of title. In some states such a vendor is required to furnish the vendee a correct abstract of the title; and if the warranty of the vendor fails, he can be sued upon this abstract. And in 2 Jones on Conveyances, section 1369, it is said, with reference to private sales of land: "The English law in regard to the possession of title deeds has generally no application in this country, on account of the prevalence here of a general system of registry. Under our registry laws, the record being notice to all the world, it is not necessary that the grantee should have possession of the title papers." If the purchaser at a private sale is not entitled by law to the back deeds, much less is the purchaser at a judicial sale. The law has provided for such a purchaser by declaring that the deed made in pursuance of such a sale shall be an original title in the hands of the purchaser. The Civil Code, section 5446, declares: "A sale regularly made by virtue of

judicial process issuing from a court of competent jurisdiction shall convey the title as effectually as if the sale was made by the person against whom the process issues." The next section declares: "In all controversies in the courts of this state, the purchaser at such a sale shall not be required to show title deeds back of his purchase, unless it be necessary for his case to show good title in the person whose interest he purchased." In the cases of *Whatley v. Newsom*, 10 Ga. 74, from which the two sections above quoted were doubtless ⁷³⁵ codified, Judge Lumpkin, in discussing the question, said: "To require the purchaser to go further would be to impose a burden which, in the end, would prove highly injurious, both to debtor and creditor, as it would drive off bidders and purchasers from these public sales. The debtor's property being seized and sold against his will, it is not to be supposed that he will surrender up to the purchaser the muniments of his title." For these reasons we think that a purchaser at a judicial sale gets no title to the deeds which constitute the chain of title of the person whose property is sold. The plaintiff in this case showed no other right to the deeds, and a verdict in his favor was, therefore, contrary to law.

Judgment reversed.

All the justices concurring, except Lewis, J., absent.

Title Deeds.—A grantee is not, as a matter of law, entitled to demand of his grantor the original muniments of title: *Kelly v. Lehigh Min. etc. Co.*, 98 Va. 405, 81 Am. St. Rep. 736, 36 S. E. 511.

LAMPKIN v. PIKE.

[115 Ga. 827, 42 S. E. 213.]

STATUTES—**Repealed Cannot be Amended.**—An amendatory statute, to be valid, must relate to an existing statute, and not to one which has been repealed and is wholly inoperative. (p. 155.)

STATUTES—**Courts.**—A statute establishing a city court and providing that the judgments of such court may be reviewed by the supreme court upon a direct bill of exceptions, is without effect, if at the time of the passage of such statute there is no such incorporated city as that named therein. (pp. 155, 156.)

G. C. Thomas, Brown & Randolph, and B. J. Clay, for the plaintiff in error.

J. J. Strickland, for the defendant in error.

828 LUMPKIN, P. J. The defendant in error moved to dismiss the writ of error in this case, "upon the ground that a bill of exceptions will not lie from the city court of Jefferson to this court, because said city court of Jefferson is not a constitutional city court." The general assembly has in the past enacted numerous statutes relating to Jefferson. We shall, however, in the discussion which follows, confine ourselves to those only of them which bear upon the question presented by the motion to dismiss. On August 14, 1872, an act was passed "to incorporate the town of Jefferson, in the county of Jackson, and to provide for the election of mayor and aldermen for the same, and for other purposes." This act, in and of itself, set forth a full and complete charter for the town. At the same session of the general assembly, on August 23, 1872, an act was passed "to incorporate the town of Jefferson, in the county of Jackson; to provide for town councilmen and intendant for the same, and for other purposes." It conferred upon the town of Jefferson corporate powers similar to those which had previously been bestowed upon "the town of Clarkesville, in the county of Habersham." The latter of these acts may be found on page 210 of the Acts of 1872, and the former begins on the same page. The obvious result of the act of August 23d was to annihilate the charter of August 14th. This charter was, however, resuscitated by an act approved February 5, 1873, which by its express terms repealed the act of August 23, 1872, and re-enacted that of August 14th: See Acts of 1873, p. 149. It will thus be seen that the effect of the act of 1873 was to provide a new charter for the town of Jefferson, the provisions of which were identical with those embraced in the act of August 14, 1872. On December 23, 1896, an act was passed "to amend an act incorporating the town of Jefferson, in the county of Jackson, approved the 14th of August, 1872, and all amendments thereof, by striking out of said act, whenever it occurs, the word 'town,' and inserting in its place the word 'city,' so that said place of Jefferson will be incorporated as a city, and not as a town": See Acts 1896, p. 191. In the body of this act the general assembly undertook to enact the legislation indicated **829** by its title. On November 30, 1897, an act was passed "to establish the city court of Jefferson, in Jackson county," whereby it was declared that "the city court of Jefferson, located in the city of Jefferson, is hereby established and created with civil and criminal jurisdiction over the whole county of Jackson." In the thirty-third section of that act the general assembly also undertook to provide that

"a writ of error shall be direct from said city court to the supreme court of this state, upon a bill of exceptions filed under the same rules and regulations as govern and control the issuing of writs of error and filing of bills of exceptions in the superior courts of this state": See Acts 1897, pp. 485, 493.

In view of the above-recited legislation, the vital and controlling question now for decision is whether or not there was, on the date of the act last mentioned, an incorporated city in the county of Jackson having the name of Jefferson. We are constrained to hold there was not. The act of August 14, 1872, after its repeal by that of August 23, 1872, was no longer a living statute capable of being amended or modified as such. As a legislative enactment, it had simply become a dead letter, and could not properly be treated and dealt with as having any force or vitality. "The legislature has general power to amend statutes, but an amendatory act, to be valid as such, must relate to an existing statute, and not to one which is nonexistent, or has been repealed": 23 Am. & Eng. Ency. of Law, 276, 277. To the same effect, see *State v. Benton*, 33 Neb. 823, 833, 51 N. W. 140; *Draper v. Falley*, 33 Ind. 465; *Blakemore v. Dolan*, 50 Ind. 194; *Board of Commissioners v. Smith*, 52 Ind. 420; *Ford v. Booker*, 53 Ind. 395; *Clare v. State*, 68 Ind. 17; *Brokaw v. Board of Commissioners*, 73 Ind. 543; *Lawson v. DeBolt*, 78 Ind. 563; *McIntyre v. Marine*, 93 Ind. 199; *Feibleman v. State*, 98 Ind. 518; *Hall v. Craig*, 125 Ind. 529, 25 N. E. 538; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. 469; *Stingle v. Nevel*, 9 Or. 62. Consequently, when the general assembly, in 1896, undertook to amend the act of August 14, 1872, by striking therefrom the word "town" wherever it occurred and inserting in its stead the word "city," the law-making power really accomplished nothing. To all intents and purposes this act of 1872 had, in the year 1896, no more vitality as a legislative enactment that if it had never in fact appeared upon the statute book. At that time the only act of incorporation which was capable of being amended was that of February 5, 1873, whereby a ⁸³⁰ new charter was granted to the town of Jefferson, to take the place of that granted August 23, 1872. That act did not recognize as operative, or attempt to amend, the act of August 14, 1872, which, by necessary implication, had been repealed by the act of August 23d, passed in that year. On the contrary, the act last referred to was recognized as being of force and as having

superseded the act of August 14th. Indeed, the act of 1873 contains the following express recital as to its intent and the purpose thereby sought to be accomplished: "Whereas, at the last session of this general assembly, two acts were passed incorporating the town of Jefferson, in the county of Jackson; and whereas, the act approved August 23, 1872, repeals the act of August 14, 1872, which is contrary to the wishes of the people of said town of Jefferson," be it enacted, etc., that the act "approved August 23, 1872, be and the same is hereby repealed; and the act incorporating said town, approved August 14, 1872, is hereby re-enacted." The legislative will is thus clearly shown to have been to get rid of an existing statute and, by express enactment, to adopt the provisions of a pre-existing act which, contrary to the wishes of the good people of Jefferson, had been rendered inoperative by ill-advised and superfluous legislation. To in this manner re-enact the provisions of a statute recognized as no longer having vitality is not only eminently proper, but is quite a different thing from totally ignoring a statute of force and attempting to amend an act which was thereby, either expressly or by necessary implication, repealed.

In view of what has just been said, the conclusion is, we think, irresistible that the above-mentioned act of 1896 should be treated as a mere nullity. That act, it is true, both in its title and in the body thereof, proposed to amend all amendments of the act of August 14, 1872; but in point of fact no attempt was made to do more than to strike from the act of August 14th the word "town" whenever it occurred in that act, and to substitute therefor the word "city." In other words, the general assembly, wholly ignoring the act of February 5, 1873, simply undertook to amend an act previously passed which no longer had any existence, force or effect. It necessarily follows that when the act of 1897, to establish the city court, was passed, there was, though this act declared that this tribunal should be located in the "city of Jefferson," no incorporated city of that name in Jackson county. The mere fact that the ⁸³¹ act declared that the court should be located in "the city of Jefferson" did not, of course, have the effect of incorporating Jefferson as a city; and while it was within the constitutional power of the general assembly to create the court established by this act, and style the same a "city" court, it was without power to provide for a direct bill of exceptions from that court to the supreme court: Savannah etc. Ry. Co.

v. Jordan, 113 Ga. 687, 39 S. E. 511. Accordingly, we are without jurisdiction to entertain the present writ of error. It is proper to add that when this court had under consideration the case of Welborne v. State, 114 Ga. 793, 40 S. E. 857, and the other cases mentioned on page 796 of 114 Ga., and pages 858, 859 of 40 S. E. (including the case now before us), and was undertaking to deal with the question of its jurisdiction over writs of error from the courts in which those cases originated, its attention was not called to the confused state of the legislation respecting the incorporation of Jefferson. Had this been done, the city court of Jefferson would not have been classed among those whose judgments can be properly reviewed by this court upon a direct bill of exceptions.

Writ of error dismissed.

All the justices concurring, except Lewis, J., absent.

Statutes.—The effect of the repeal of statutes is considered in the monographic note to Wharton v. State, 94 Am. Dec. 217-246. The repeal of statutes by implication is considered in the monographic note to Howard v. Hulbert, 88 Am. St. Rep. 271-297.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

METZGER v. MORLEY.

[197 Ill. 208, 64 N. E. 280.]

JUDGMENT NUNC PRO TUNC.—The Minutes of the judge, though not properly a part of the record, are sufficient to authorize the entry of an order or judgment nunc pro tunc. (pp. 159, 160.)

JUDGMENT NUNC PRO TUNC—Estoppel to Move for.—If an appellee moves to dismiss the appeal because the clerk failed to enter a formal judgment, he is not thereby estopped to move, at a subsequent term, for the entry of a judgment nunc pro tunc. (pp. 160, 161.)

A. E. De Mange and George K. Ingham, for the appellant.

V. Warner, for the appellee.

209 **WILKIN, J.** On the sixteenth day of March, 1900, Stephen K. Morley, by his attorneys, Moore & Warner, entered a motion in the circuit court of DeWitt county to redocket the case of Morley v. Metzger et al., and for an order directing its clerk "to enter of record, in full and proper form, the judgment theretofore pronounced and rendered by the court in said cause, as of the date when said judgment was pronounced and rendered." Due notice of the motion was given to the defendants, and they appeared therein and resisted the same. The court granted the motion and made an order, as follows: "And the court, being fully advised in the premises, doth redocket said cause, and finds that on the sixth day of December, A. D. 1896, at a regular term of said court, on the verdict of the jury in said cause, the court pronounced and rendered a judgment in favor of the plaintiff and against the defendant for the sum of fifteen hundred and twenty-one dol-

lars and nine cents damages and costs of said cause, and that the clerk of said court failed to enter of record said judgment in full and proper form. Therefore, in consideration of the premises, the court hereby orders and directs said clerk to enter of record, in full and proper form, in said cause, as of date December 6, A. D. 1898, said judgment in favor of plaintiff and against defendant for the sum of fifteen hundred and twenty-one dollars and nine cents and costs of said cause, the judgment pronounced and rendered by the court in said cause on said last-mentioned date." To the entry of this order the defendants excepted. The clerk thereupon entered up, in due form, a judgment according to the directions of said order, to which the defendants also then and there excepted and prayed an appeal to the appellate court, which was allowed. That court having affirmed the judgment of the circuit court, this further appeal is prosecuted.

²¹⁰ The only question in the case is whether there was a sufficient minute, note, or memorial paper appearing of record in the court to justify the entry of the judgment at a subsequent term. We held in *People v. Quick*, 92 Ill. 580, that the court, at a subsequent term, may, from its minutes or other proper evidence, enter an order nunc pro tunc correcting a judgment so that it will show the real judgment in fact rendered; and in *Howell v. Morlan*, 78 Ill. 162, we said: "If, then, it be true, as disclosed by the record, that judgment was entered upon the verdict at the term it was returned into court by the jury and the clerk omitted to write up the judgment in the record, the court, at a subsequent term, undoubtedly had the power to order the judgment entered nunc pro tunc. In *Freeman on Judgments* (section 61) the author says: "The entry of a judgment nunc pro tunc is always proper when a judgment has been ordered by the court, but the clerk has failed or neglected to copy it into the record.'" The only qualification of this rule is, that the subsequent order must be made upon something appearing in the record, and not merely upon parol testimony, nor upon the mere memory of the judge himself.

This case was before us at a former term on appeal from the appellate court by Metzger and others, heard in that court on appeal from an informal judgment entered December 6, 1898. Upon that appeal in the appellate court appellants assigned for error the insufficiency of the clerk's entry of the judgment, whereupon appellee moved to dismiss the appeal for the rea-

son that there was no final judgment in the circuit court from which an appeal could be prosecuted. The appellate court sustained the motion and dismissed the appeal, and we affirmed that judgment: *Metzger v. Morley*, 184 Ill. 81, 56 N. E. 299. It appeared from the record in that case that the clerk, instead of entering a formal judgment upon the verdict of the jury, simply wrote upon the record, "and judgment on the verdict for fifteen hundred and twenty-one dollars and nine cents." We said, in affirming the ²¹¹ judgment of the circuit court: "The recital so made by the clerk amounts to nothing more than a loose memorandum, evidently intended as a guide to the clerk in making up his record at some subsequent time. Such an entry by the clerk cannot be called a judgment." It has always been held by this court that the minutes of the judge, though not properly any part of the record in a case, are sufficient to authorize the entry of an order or judgment at a subsequent term. It appears from the bill of exceptions in this record that the judge did consider his minutes made at the time of the trial, as follows: "Trial by jury and verdict for fifteen hundred and twenty-one dollars and nine cents, and motion by defendant for new trial; motion overruled and judgment on the verdict for fifteen hundred and twenty-one dollars and nine cents, and appeal prayed and allowed; bond in three thousand dollars in twenty days, to be approved by clerk by agreement; b. of e. in one hundred and twenty days." We are unable to see why the attempted entry by the clerk, "and judgment on the verdict for fifteen hundred and twenty-one dollars and nine cents," with the foregoing minutes of the judge, was not amply sufficient to authorize the order and judgment *nunc pro tunc* in question. To hold otherwise would be to deprive the court of the power to make its record speak the truth under any and every circumstance.

It is insisted, however, by counsel for the appellants, that the appellee is not in a position to insist that judgment was pronounced at the December term, 1898, because of his contention upon the former appeal. This is upon the assumption that it was insisted in the appellate court, and in this court on the motion to dismiss that appeal, that no judgment whatever had been pronounced upon the verdict. But that was not the real contention of the appellee. His contention then was, that no sufficient final judgment had been entered upon the verdict. He did not then contend that judgment had not been pronounced by the court upon the verdict, nor that no

sufficient memorandum of that fact appeared of record upon which a proper judgment could thereafter be entered, but simply that the clerk had failed to enter ²¹² up a formal judgment. His position, then, was not necessarily inconsistent with his motion at the subsequent term nor with his contention now. If it should be held that the appellee is estopped by his motion to dismiss the former appeal because no judgment had been entered upon the verdict, then with equal propriety it could be said the defendants are estopped to deny that a judgment in some form was then pronounced, because by their appeal they must have admitted that there had been an attempt to enter judgment.

We agree with the appellate court in holding that the order and judgment of March 16, 1900, was fully justified.

Judgment affirmed.

Judgments Nunc pro Tunc.—The power resides in every court to correct and amend the entries on its minutes nunc pro tunc: Ware v. Kent, 123 Ala. 427, 82 Am. St. Rep. 132, 26 South. 208. But judgments nunc pro tunc can be entered only when there is something in the record which furnishes a basis to amend by: Young v. Young, 165 Mo. 624, 88 Am. St. Rep. 440, 65 S. W. 1016. Upon what evidence the entry can be made, see the note to Ninde v. Clark, 4 Am. St. Rep. 831, 832; Knefel v. People, 187 Ill. 212, 79 Am. St. Rep. 217, 58 N. E. 388.

BRADY v. HUBER.

[197 Ill. 291, 64 N. E. 264.]

DEEDS—Delivery.—The Recording of a deed raises a presumption of its delivery. (p. 164.)

DEEDS—Delivery.—The Acceptance of a deed by the grantee is a constituent element of its delivery. (p. 164.)

DEEDS—Delivery Conclusively Presumed from Recording.—If a father, with the consent of his daughter, executes a deed to her and records it, to place his property beyond the reach of creditors, he is concluded by the presumption of delivery arising from the recording. (pp. 164, 165.)

FRAUDULENT CONVEYANCE.—The Law Provides no Remedy to either of the parties to a fraudulent conveyance, if in pari delicto, either to disturb or enforce the conveyance. (p. 165.)

FRAUDULENT CONVEYANCE—Trust to Reconvey.—If one conveys property in fraud of his creditors, courts will not enforce a parol promise by the grantee to hold it in trust for the grantor. (p. 166.)

Dunnegan & Leverett, for the appellants.

John G. Irwin and B. J. O'Neill, for the appellee.

²⁹¹ BOGGS, J. This was a bill in equity filed by appellee, wherein it was prayed that upon final hearing a decree be entered vacating and declaring null and void a certain deed executed by the appellee, dated on the eighteenth day of March, 1899, purporting to convey to his daughter, Louisa (now ²⁹² Louisa Brady), one of the appellants, a certain parcel of land in Charles Howard's addition to the city of Alton, twenty feet in width, fronting on the north side of Seventh street, thence extending north one hundred feet; or, in the alternative, for a decree creating a lien on said premises to provide for the comfort, support, and medical care of the appellee, the complainant, during his natural life. On a hearing upon bill, answer, and replication, a decree was entered ordering and decreeing that the deed for the property in the bill mentioned be so reformed and corrected as to reserve to the appellee, the grantor, the sole and exclusive possession, use and enjoyment of the premises for and during the time of his natural life, upon condition that the said grantor pay all taxes and assessments against the same during his life and keep the same in proper repair, and do not suffer or permit waste to said premises while so held by him for life.

It appeared from the testimony that on the said eighteenth day of March, 1899, the appellee, a widower, and the appellant, his daughter (now Louisa Brady), lived together in a dwelling-house on the premises in Alton, described in the deed sought to be reformed by the bill. The father was the owner of the premises in Alton and also of a tract of land in St. Charles county, Missouri. He was involved in some manner of litigation, the nature whereof is not disclosed. He desired to put the title to his property where it would not be endangered by an adverse determination of the litigation. He executed two deeds to his daughter, one conveying to her the premises in the city of Alton and the other the lands in Missouri. The theory upon which the appellee asks an affirmance of the decree is, that the appellant, Louisa Brady, by arousing the fears of the appellee as to the possible adverse result of the litigation in which he was involved, and by repeated importunities, induced the appellee to execute the deeds to her after many repeated promises upon her part to reconvey the property to him at any ²⁹³ time upon his request, and that the appellee did not deliver to said appellant either of the deeds, but that both deeds, though recorded, remained in his possession until

the twenty-sixth day of July in the same year; that the appellant Louisa Brady was about to be married to her coappellant, John Brady, and the appellee on said twenty-sixth day of July demanded that she should reconvey both pieces of property to him; that she refused, but finally said she would reconvey to him the Missouri land but not the Alton property, but she told him that the house should be his as long as he lived; that appellant Louisa then executed a deed reconveying to the appellee the land in Missouri, and he accepted it with the understanding the Alton property was to be his as long as he lived; that with this understanding he then delivered to her the deed for the property in Alton; that on the day following this, his daughter, Louisa, and said John Brady were married, and on her application appellee permitted her and her husband to take up their home with him in the dwelling-house on the Alton property, and that they entered into an agreement that she was to board him and take care of him as long as he lived, in consideration of the use of the premises; that after complying with this promise and understanding for about a year and a half, appellant and her husband separated and she returned to him the deed for the Alton property; that later the daughter and her husband became reconciled and took up their home elsewhere; that appellee rented the house and Alton property to the appellant Morganroth, and the appellant Louisa notified the said Morganroth to quit and give up possession to her.

The argument of counsel for the appellee is, the decree should be upheld on the ground the execution of the deed was procured by fraud and imposition, and the delivery thereof procured on a parol promise to hold the land in trust for the grantor, and that chancery will lend its aid to enforce the trust. Counsel do not contend that ²⁹⁴ a mere breach of the promise to reconvey is sufficient to create a trust that equity would enforce, but insist that the fraud alleged to have been exerted in procuring the deed, in connection with the promise and breach thereof, warrants equitable interference.

The bill does not charge that the appellee was induced to sign and have the deeds recorded by any species of fraud or imposition. The answer avers the deeds were delivered when made, denies the alleged oral contract was made, but does not plead the statute of frauds. We think it must be held the deeds were delivered at the time of the making thereof. The evidence shows two deeds from the father to the daughter were

executed at the same time, one conveying to her the property here involved—the Alton property in Madison county, Illinois—and the other the land in the county of St. Charles, in the state of Missouri; that the appellee, her father, sent the appellant, the daughter, with the deed to the Missouri land, to St. Charles, to be filed for record, and that he took the other deed to Edwardsville, the county seat of Madison county, and filed it with the recorder to be recorded. Both deeds were duly recorded. The appellee testified the deeds were both returned to him by mail by the respective recording officers, and the appellant, his daughter, swears they were sent to her by such officers. The execution and recording of the deed here involved, by the appellee, raise the presumption, in law, that he intended to divest himself of title, and unless such presumption is rebutted it must be held the deeds were delivered: 9 Am. & Eng. Ency. of Law, 2d ed., 159, and many cases decided in this court, cited in note 4. In *Union Mutual Life Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166, we said (95 Ill. 284, 35 Am. Rep. 166): “The mere act of recording, alone, as we have seen, is but *prima facie* evidence of a delivery and liable to be rebutted; and it is successfully rebutted, as all the cases agree, when it is shown that the deed was not in the nature of a family settlement or of a gift ²⁰⁵ to a minor (as to which hereafter), but is intended to confer no benefit upon the grantee, and its execution and recording are wholly unknown to him until after the death of the grantor.” In *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893, we said (121 Ill. 97, 2 Am. St. Rep. 68, 11 N. E. 896): “We think, in the case of an adult grantee, the acknowledging and recording of the deed without his knowledge or consent does not, of itself, according to the weight of authority, amount to a delivery.” In *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, we held the presumption of delivery arising from the registration of a deed had been successfully rebutted by proof, among other things, that the grantee was ignorant of the execution and recording of the deed and claimed nothing under it.

Acceptance by the grantee is a constituent element of the delivery of a deed, and it will be observed that in all the cases cited the absence of knowledge on the part of the grantee has been noted as a circumstance tending to rebut the presumption of delivery which arises from the registration of the deed. Acceptance may be presumed, but if the grantee is *sui juris*

the presumption of acceptance does not necessarily arise, and in such cases it may be shown, in rebuttal of the presumption of delivery which arises from registration of the deed, that the execution and recording of the deed were acts of the grantor alone, unknown to and unauthorized by the grantee. But here no question of acceptance can arise. It appeared without dispute the appellee, influenced by the fear that his lands might be seized by a creditor, executed a conveyance thereof to his daughter with intent to divest himself of title so that it would be beyond reach of his creditors; that the deed imposed no burden on the grantee, but was without condition or qualification and was beneficial to her; that the daughter, the grantee, well knew of the execution of the deeds and consented that the conveyances should be made to her, and that the grantor, with the knowledge and consent of the grantee, placed the deed upon the public records, with the ²⁰⁰ intent it should be deemed and taken by his creditors as a completed and effective conveyance of the premises. Under such circumstances the grantor must be deemed concluded by the presumption of delivery which arises from the recording of the deed: *Walton v. Burton*, 107 Ill. 54; *Thompson v. Dearborn*, 107 Ill. 87; *Moore v. Giles*, 49 Conn. 570. Manual delivery by the grantor to the grantee is not essential: *Rivard v. Walker*, 39 Ill. 413; *Rode-meier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176, 48 N. E. 468.

It is a rule having universal recognition, that though creditors of a fraudulent grantor may invoke the aid of the courts to have a conveyance made for the purpose of hindering and delaying them in the collection of their demands declared inoperative as against their rights and interests, the law will not provide a remedy which either of the guilty parties, if in *pari delicto*, can avail of against the other, either to disturb or enforce the conveyance. A court of equity will not lend its aid to the grantor to cancel the deed, or reform it so as to show the verbal contract of the grantee, or to enforce any agreement to reconvey, or declare that any trust or confidence has grown out of the conveyance: *McElroy v. Hiner*, 133 Ill. 156, 24 N. E. 435; 14 Am. & Eng. Ency. of Law, 2d ed., 278. Nor will a court of law entertain a legal action brought by the fraudulent grantee against the grantor to recover possession of the property so fraudulently conveyed: *Kirkpatrick v. Clark*, 132 Ill. 342, 22 Am. St. Rep. 571, 24 N. E. 71. The law, in such cases, refuses to aid either party, but leaves them where it finds them.

Counsel for appellee cite *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310, *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516, *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18, and *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229, in support of the proposition announced in that behalf, that "where the party to whom a deed absolute is made obtains the execution and delivery thereof to himself by fraud and imposition upon the grantor, on a parol promise to hold the land in trust for the grantor, chancery will in such case lend its aid to enforce the trust." The doctrine taught ²⁹⁷ in the cases cited is, that though the statute of frauds requires that all declarations or creations of trust shall be manifested in writing, yet where a grantee has obtained the execution of the deed by fraud and imposition upon the grantor, a parol promise to hold the land in trust will, because of the fraud and imposition so practiced on the grantor, be enforced in chancery. This rule is applicable to conveyances made by the grantor in trust for lawful purposes—not to cases, such as the one at bar, where the parol promise or undertaking is to hold the title for the grantor in order that his creditors may not be able to have it applied to their demands, or to reconvey to him when that illegal purpose has been accomplished.

There is no foundation on which to base an insistence that the parties to the conveyance under consideration were not in *pari delicto*. There is no suggestion in the testimony the father was in any way deficient in body or mind, or that he was afflicted by disease or enfeebled by age, or that the daughter was in any respect his superior. His testimony that she suggested that he should convey his property to her to avoid the possible adverse result of the litigation in which he was involved, and that she "bothered him" repeatedly about the matter, is all that appears tending to show that she took the initiative in the matter. This is denied by her, and even if true would not be sufficient to relieve him from the position of a party *particeps criminis*. The testimony altogether shows his was the controlling mind during the course of the completion of the fraudulent transaction and that she was obedient to his direction and control. Afterward she became engaged to be married, much to his displeasure. He demanded she should reconvey both of the properties to him before the celebration of the marriage, partly for the reason he disliked her intended husband and was opposed to the marriage, but he also urged as an additional reason that her intended was a minor ²⁹⁸ and could

not join with her in reconveying to him, and that for that reason she could not, after the celebration of the marriage, comply with her agreement to return to him the title to the premises.

The court erred in decreeing that the deed should be reformed. The bill should have been dismissed. Neither courts of law or in equity afford him a remedy to reform or cancel the deed or restore the title to him, or any remedy to her to disturb him in the possession of the property.

The decree will be reversed and the cause will not be remanded.

Deeds—Delivery.—*The Recording of a deed as evidence of delivery* is considered in the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 547-550. The fact that a deed is recorded is prima facie evidence that it was delivered: *Sweetland v. Buell*, 164 N. Y. 541, 79 Am. St. Rep. 676, 58 N. E. 663; *Shields v. Bush*, 189 Ill. 534, 82 Am. St. Rep. 474, 59 N. E. 962; *McReynolds v. Grubb*, 150 Mo. 352, 73 Am. St. Rep. 448, 51 S. W. 822; *Parker v. Salmons*, 101 Ga. 160, 65 Am. St. Rep. 291, 28 S. E. 681.

When a Conveyance is in Fraud of Creditors, the law will not aid either of the parties, but will leave them where they have placed themselves, without relief: *Williams v. Clink*, 90 Mich. 297, 30 Am. St. Rep. 443, 51 N. W. 453. However, such a conveyance may be set aside at the instance of the grantor, if he is not in pari delicto with the grantee: *Harper v. Harper*, 85 Ky. 160, 7 Am. St. Rep. 583, 3 S. W. 5. See, also, *Carll v. Emery*, 148 Mass. 32, 12 Am. St. Rep. 515, 18 N. E. 574; monographic note to *Whitforth v. Thomas*, 3 Am. St. Rep. 727, 745.

DOUTHART v. CONGDON.

[197 Ill. 349, 64 N. E. 348.]

ILLEGAL CONTRACT.—If Any Part of an Entire Consideration for a promise, or any part of an entire promise, is illegal, the whole contract is void. (p. 170.)

BROKER—Transaction Without a License.—If a broker transacts business in violation of an ordinance requiring of him a license, and the charges for his services form part of the entire consideration for notes given him by the customer, the notes are not enforceable. (pp. 169-171.)

The firm of Hamill & Congdon were brokers and commission merchants on the board of trade. Daniel Butters, the appellant's testator, engaged this firm. The parties had an accounting of the transactions between them, and Butters was held to account to the firm in the sum of three thousand two hundred and forty-eight dollars and nineteen cents. This amount included an item of thirty-one dollars and twenty-

five cents charged Butters as a commission for executing orders for the sale of grain, which transaction was in violation of an ordinance requiring brokers to procure a license. Butters gave six notes for the aggregate amount, three to each of the partners individually. Hamill assigned two of these notes to the appellee, and on the death of Butters, the appellee filed them for allowance against the estate. The probate court disallowed the claim in toto, on the ground that the charge of thirty-one dollars and twenty-five cents was illegal and tainted all the notes with illegality. In the circuit court, on a hearing before the court, the appellant presented the following propositions to be held as the law of the case: "The court holds, as a matter of law, that if part of the consideration of a contract is illegal, the whole contract is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal. The court holds, as a matter of law, that where notes are given in payment of a whole account, no note being given for any specific portion thereof, and some of the items of the account are legal and some illegal, the entire notes can be avoided, and the payee or holder with notice cannot recover thereon, even to the extent of the lawful items. This court holds, as a matter of law, that in a suit on a promissory note, although promises and considerations therefor are distinguishable, partial, illegal consideration is a good defense to a recovery upon any part of the instrument against payee or holder with notice." The court refused these propositions, and awarded judgment for the claimant in the amount of the notes with interest, less the sum of thirty-one dollars and twenty-five cents and interest thereon. The appellate court affirmed this judgment, and the case is here on appeal by the executor.

Douthart & Brendecke, for the appellant.

Frank E. Reed, for the appellee.

³⁵² BOGGS, J. In *Braun v. City of Chicago*, 110 Ill. 186, and *Banta v. City of Chicago*, 172 Ill. 201, 50 N. E. 233, we held the city of Chicago had lawful power to adopt the ordinance in question, and that such ordinance was constitutional and effective. The ordinance declared it to be unlawful for the said ³⁵³ firm of Hamill & Congdon to engage in the transaction of the business of commission merchants and brokers on the

board of trade without having a license authorizing them so to do. The ordinance also specified and declared a penalty should be inflicted for the violation of its provisions.

In *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124, *Sinclair*, a citizen of the city of Chicago, brought assumpsit against *O'Neill* to recover commissions for his services in finding a purchaser for certain real estate owned by *O'Neill*. The ordinance involved in the case at bar was then in force in the city of Chicago, and *O'Neill*, in defense to the action brought by *Sinclair*, interposed a special plea setting forth the ordinance, and averring that *Sinclair* had not, at the time of the transaction then involved, obtained, and did not then have, a license, as required by the said ordinance, authorizing him to act as a real estate broker in the city of Chicago. On the hearing *O'Neill* contended that *Sinclair* could not recover commissions for his services in negotiating the sale of real estate without having a license authorizing him to transact the business of a real estate broker, and asked the court to so instruct the jury. The court refused the instruction, and its refusal was assigned as for error. We there said (153 Ill. 530, 39 N. E. 126): "Was the plaintiff, in negotiating the sale of the defendant's property, exercising the business of a real estate broker, within the meaning of the ordinance? If he was, it would seem very clear that the transaction was illegal and that he is not entitled to recover for his services. The rule is, that where the subject matter of an agreement is prohibited and made unlawful by statute or by a municipal ordinance, it cannot be enforced, though the statute or ordinance merely inflicts upon the offender a penalty, and does not, in terms, declare the contract void." We, however, held that the evidence did not tend to show that *Sinclair* was engaged in the business of selling or negotiating sales of real estate, and that the ³⁵⁴ mere act of negotiating this one sale for *O'Neill* did not constitute him a real estate broker, and that the refusal of the court to give the instruction asked was not error of reversible character.

In *Union Nat. Bank v. Louisville etc. Ry. Co.*, 145 Ill. 208, 226, 34 N. E. 135, we said: "The general rule therefore is, that any act which is forbidden either by the common or the statutory law, whether it is *malum in se* or merely *malum prohibitum*, whether indictable or only subject to a penalty or forfeiture, or however otherwise prohibited by statute or the common law, cannot be the foundation of a valid contract. . . . A statute may render an agreement illegal in one of two ways,

viz., by express prohibition or by the imposition of a penalty: Anson on Contracts, 172. Where the statute does no more than impose a penalty upon the carrying out of the objects of the contract, a question has sometimes arisen whether or not the imposition of the penalty of itself amounts to a prohibition, although the weight of authority would seem to be that where a statute provides a penalty for an act, a contract for the performance of such act is void, although the statute does not pronounce it void or prohibit it in express words. But no such question can arise where the statute expressly prohibits the act. In that case the act is necessarily unlawful, and a contract for its performance is necessarily void and incapable of enforcement."

In *Miller v. Ammon*, 145 U. S. 421, 12 Sup. Ct. Rep. 884, it was said: "The general rule is, that a contract made in violation of a statute is void, and that when plaintiff cannot establish his cause of action without relying upon an illegal contract he cannot recover. . . . There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal. . . . It is true that a statute containing a prohibition and a penalty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition. ³⁵⁵ . . . Where the statute is silent and contains nothing from which the contrary may be inferred, a contract in contravention of it is void."

The author of the article on "Broker," in the second edition of the American and English Encyclopedia of Law (volume 4, page 982), states his deductions from the authorities, as follows: "Where, by the terms of a statute or city ordinance, it is made illegal for a broker to exercise his business without a license, a broker cannot recover commissions for services rendered without such license."

We are cited by counsel to *Toledo Tie etc. Co. v. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. 37, where it was held that unless ordinances and statutes expressly declare that a failure to obtain a license to carry on any business shall render such business, dealing and transaction void and unenforceable, the unlicensed person may recover for services, etc. In that opinion it is said: "We are aware that the courts of Indiana, Illinois, Wisconsin, and perhaps other states, hold a different doctrine." We understand the law of this state as does the supreme court of West Virginia.

The ordinance in the case at bar denounced as unlawful the prosecution of the business of a broker in grain without a license, and also provided for the infliction of a fine as a punishment or penalty for each transaction of a broker in violation of the ordinance. The particular transaction for which the sum of thirty-one dollars and twenty-five cents was charged and included in these notes was an unlawful act, and subjected the said brokers to punishment by way of a fine. It was illegal, and entered into and formed a part of the consideration for the promise contained in each of the notes. The rule has long been established that if any part of an entire consideration for a promise or any part of an entire promise be illegal, the whole contract is void: *Henderson v. Palmer*, 71 Ill. 579, 22 Am. Rep. 117; *Tenney v. Foote*, 95 Ill. 99; *Metcalf on Contracts*, 246; *Addison on Contracts*, 905; *Chitty on Contracts*, 730; 1 *Parsons on Contracts*, 456; ³⁵⁶ 1 *Parsons on Notes and Bills*, 217; *Story on Promissory Notes*, 190; *Byles on Bills*, 211; *Chitty on Bills*, 94; 4 Am. & Eng. Ency. of Law, 2d ed., 192; 17 Am. & Eng. Ency. of Law, 2d ed., 308; *Didoe v. Webb*, 20 Ohio St. 431, 5 Am. Rep. 664. The view expressed by Mr. Parsons in his work on Notes and Bills, *supra*, is, that if the consideration is in part illegal the whole promise is void; that an action might be brought on the original transaction on so much as was legal, but could not be maintained upon a note given for the entire consideration. This question has frequently arisen in actions on promissory notes in which the consideration was in part for groceries or other articles of merchandise and in part for intoxicating liquors sold without license or otherwise in violation of law. In such cases it has been uniformly held that such notes are wholly void, and that no recovery could be had on them, even for the groceries or merchandise: 17 Am. & Eng. Ency. of Law, 2d ed., 308. A partial want or a partial failure of consideration avoids a note only pro tanto, but illegality in a part of the consideration upon which the promise contained in the note is founded avoids the entire promise and renders the entire note uncollectible. "The whole consideration is the basis of the whole promise. The parts of the consideration are inseparable. Such is the doctrine of the text-books." This principle of law was correctly stated in the propositions of law presented by the executor, and the refusal of the circuit court to hold them to be correct manifests that the court did not entertain and apply correct principles of law in the determination of the controversy. This error resulted in the judgment appealed from.

It follows that such judgment, and the judgment of the appellate court affirming it, must be and each is reversed, and the cause will be remanded to the circuit court for further proceedings in conformity with this opinion.

Illegal Contracts.—If any part of an indivisible promise, or any part of an indivisible consideration is illegal, the whole is void, and no action can be maintained thereon: *Case v. Smith*, 107 Mich. 416, 61 Am. St. Rep. 341, 65 N. W. 279; *Edwards v. Randle*, 63 Ark. 318, 58 Am. St. Rep. 108, 38 S. W. 343; *Handy v. St. Paul etc. Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695, 42 N. W. 872. See, too, *Dow v. Taylor*, 71 Vt. 337, 76 Am. St. Rep. 775, 45 Atl. 220; *St. Louis Fair Assn. v. Carmody*, 151 Mo. 566, 74 Am. St. Rep. 571, 52 S. W. 365. But, if valid and illegal considerations in the same contract are susceptible of division, that part of the consideration which is legal may be enforced; *Emshwiler v. Tyner*, 21 Ind. App. 347, 69 Am. St. Rep. 360, 52 N. E. 459. If an ordinance makes it unlawful for an unlicensed person to transact certain business, any contract made in such business by one not authorized is void: *Buckley v. Humason*, 50 Minn. 195, 36 Am. St. Rep. 637, 52 N. W. 385. But see *Murray v. Doud*, 167 Ill. 368, 59 Am. St. Rep. 297, 47 N. E. 717.

VILLAGE OF LEMONT v. JENKS.

[197 Ill. 363, 64 N. E. 362.]

TAX as a Personal Charge.—A Special Tax or Assessment is not a personal charge and cannot be recovered in a personal action. (p. 174.)

THE POLICE POWER is Chiefly Regulative, and finds its basis in the maxim, "Sic utere tuo ut alienum non laedas." (p. 175.)

POLICE POWER—Taxation.—Under the police power, as a part of its regulative policy, a small fee may be imposed, but it cannot be resorted to as a taxing power. And whenever a court can see that the purpose of a regulation is primarily revenue, it will be referred to the taxing power and measured accordingly. (p. 175.)

A TAX is a Tribute commanded by sovereignty of the subject and for which his property is held. (p. 176.)

TAXATION—What is Not.—The words "tax, rent, or rates," in a statute authorizing cities to assess and collect from the inhabitants thereof taxes, rents, or rates for water supplied to them, relate to money due the city by virtue of contractual relations, and not to any mode of taxation, strictly speaking. (pp. 175, 176.)

TAXATION—Uniformity.—A Water Ordinance imposing, as compensation for fire protection, a certain sum per annum, in addition to the water rates, on each lot having thereon a building and adjoining a street through which is a public water pipe, without regard to the value of the property, is unconstitutional. (pp. 175, 176.)

Action of debt by the village of Lemont to recover a water tax assessed under an ordinance in the following terms: "As compensation for the benefits derived from increased protection against fire, there shall be paid for each lot or parcel of ground having a building thereon, which shall abut or adjoin any street, avenue, or alley through which any public water supply pipe is laid and which can be conveniently supplied with water from such pipes, the sum of two dollars and fifty cents per annum in addition to the foregoing rates for the use of water, which tax shall be due and payable on the first day of May in each year, and if paid during said month shall be subject to the same discount as provided in section 6 of this chapter. If such tax is not paid prior to June 1st it may be collected in an action of debt in the name of the village, against the owner or occupant of such lot or parcel of ground, in any court of competent jurisdiction, or such tax may be collected in the same manner as other taxes."

Frank W. Welch and F. P. Snyder, for the appellant.

W. D. Launder and A. B. Jenks, for the appellee.

364 RICKS, J. There are three methods of taxation recognized by our constitution—namely, special taxation, special assessment and general taxation. All these modes are authorized by the constitution, and the legislature is empowered to delegate authority to municipal corporations to exercise either of them. The suit in question is an action of debt for a tax as a personal obligation, alleged to arise by virtue of an ordinance of the village of Lemont, which is set out in the statement. Appellant expressly says: "The tax in question in this case is a general tax, and not a special tax or special assessment, and in no sense is it a tax levied for local improvement."

365 While the ordinance set out and relied upon by appellant would, from an examination of it, impress one as being upon the lines of special taxation, yet it lacks the element of a sufficient description of any local improvement that would warrant the conclusion that it was intended to be either a special tax or special assessment, and, indeed, if it were either the demurrer should have been sustained, as this court has held that such taxes are not a personal charge and cannot be recovered in a personal action: *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143. The appellant's contention is that this is a general tax, and that it is authorized, if not expressly by the letter of the law, as a necessary incident to the authority found in paragraphs 442-445 of chapter 24: 1 Starr & Curtis' Statutes of 1896, p. 863.

Paragraph 442, *supra*, confers power upon cities and villages to provide for a supply of water for the purpose of fire protection, and for the use of the inhabitants thereof, by the erection, construction and maintenance of a system of waterworks. Paragraph 445 authorizes the common council of cities and the trustees of villages to make the needful regulations for the erection, construction and management of such waterworks, and for the use of the water supplied by the same, and confers upon such cities and villages the right and power to tax, assess and collect from the inhabitants thereof such tax, rent or rates for the use and benefit of water used or supplied to them by such waterworks as the common council or board of trustees shall deem just and expedient; and further, that the water taxes, rates, and rents shall be a lien upon the premises for which the water is used or supplied, and that such taxes, rents or rates shall be paid and collected and such lien enforced in such manner as the common council shall by ordinance direct and provide.

While counsel admit that this tax, as sought to be recovered, is subject to the charge of want of uniformity, ³⁶⁶ as commonly understood, they insist, nevertheless, that authority for such tax is found in the exercise of the police power, the argument being that the provision for protection against fire is one of the exercises of the police power, and that this method of taxation will be inferred as incident to, and necessary to, the proper carrying out of the public requirement. In this argument counsel overlook the fact that by paragraph 443 of the same chapter of the statute referred to above, it is expressly provided that "such cities, incorporated towns and villages may borrow money and levy and collect a general tax in the same manner as other municipal taxes may be levied and collected for the erection, construction and maintaining of such waterworks, and appropriate money for the same"; and paragraph 446 authorizes "the expense of locating, erecting and constructing reservoirs and hydrants for the purpose of fire protection, and the expense of constructing and laying water-main pipes," by special assessment. Here, then, ample provision is made for the raising of revenues for erecting, constructing, maintaining and operating a system of waterworks by general taxation, and to construct those portions giving a special local benefit by special assessment. When express power is given by law to do an act in one mode which is full and ample, we would hardly feel warranted in appealing to the police power to justify the

doing of it in some manner other than the manner so provided. In fact, the police power does not seem to us to be in any manner applicable to the question before us. That power is chiefly regulative, and finds its basis in the maxim, "Sic utere tuo ut alienum non laedas"; and though, as a part of its regulative policy, it may impose a small fee, usually supposed to cover the expense of the law's supervision of the business or matter to which it applies, it cannot be resorted to as a taxing power, and whenever, from the context of the act or the sum demanded, the court can see that the purpose of the regulation and fee imposed ³⁶⁷ is primarily revenue, it will refer it to the taxing power and measure the act by its standards and requirements.

The ordinance in question is not regulative, but is clearly for the purpose of raising revenue in addition to the earnings of the water system. In the manner proposed there is an apparent district created, composed of the lots abutting on the streets, avenues or alleys through which a water supply is laid, and which, from the language of the ordinance itself, we are led to infer is less in area than the corporate limits of the village. Here real estate only is to be taxed—and that, too, without any regard to its extent or value or the value of its improvements, the only requirement being that there shall be a building on the tract, in which case the tract of ground, large or small, of great or little value, whether the building be worth one hundred thousand dollars or ten dollars, is arbitrarily taxed two dollars and fifty cents per annum, which sum is by the ordinance declared to be in addition to the rates for the use of water, and in addition to being made a personal charge is made a charge upon the land. We cannot conceive of any more flagrant disregard of the constitutional requirement of uniformity than this case illustrates. The regulation that is spoken of in paragraph 445 of chapter 24 of the statute, *supra*, and the tax which is there spoken of by the other names of "rent" or "rates," all refer to the mere operation of the plant and the collection of its revenues, and not to any mode of taxation, strictly speaking. The revenues and rates that are spoken of are the earnings of the plant from the use of the water by those persons who take the same, and the last part of the paragraph, giving a lien upon the premises, where used, for the tax or rents or rates, is but the means of securing the payment to the city of the earnings of the plant, and is no part or in no way within the contemplation of taxes as such. The water rate, rents and taxes referred to in that paragraph relate to moneys due the city from those

using the water by virtue of the contractual relation that exists between ³⁶⁸ them, whereas a tax does not depend upon the contract, but is the tribute of support commanded by sovereignty of the subject and for which his property is held—"the regular, uniform and equal contribution which the people are required to make for the support of the government, and for carrying out and making effective those things which are useful and which conduce to the public welfare and well-being." The authority given by paragraph 445, *supra*, is "to tax, assess and collect from the inhabitants thereof such tax, rent or rates for the use and benefit of water used or supplied to them." Clearly, it has reference only to those who are customers of and users of the water from such waterworks. This ordinance declares that the two dollars and fifty cents thus demanded is not for the use of the water, but in addition thereto. The revenues and taxes provided by the act authorizing cities and villages to construct, maintain and operate water plants were deemed by the legislative authority as ample for the purposes named, and such municipalities cannot go beyond them without express authority, and the general tax must be uniform and upon all the property within the municipality: *Village of Morgan Park v. Wiswall*, 155 Ill. 262; 40 N. E. 611; *Primm v. City of Belleville*, 59 Ill. 142.

We do not think that paragraph 445 of chapter 24 of the statute, *supra*, relied upon by appellant, furnishes any authority for the ordinance in question, but take the view that said ordinance is in violation of section 9 of article 9 of the constitution of 1870 and in general conflict with our rule of taxation, and is void: *Primm v. City of Belleville*, 59 Ill. 142; *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Jones v. Water Commrs.*, 34 Mich. 273; *Vreeland v. Jersey City*, 43 N. J. L. 135; *Jersey City v. Vreeland*, 43 N. J. L. 638.

The demurrer to the declaration was properly sustained, and the judgment of the county court of Cook county is affirmed.

A Tax is a Tribute for the support of government imposed upon property in return for the protection and advantages which the government affords to the owner. It is not founded on contract: See the monographic notes to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 591-511; *Zigler v. Menges*, 16 Am. St. Rep. 365-371, on what is a tax and what impositions may be sustained as exercises of the taxing power. Taxes on property must be uniform: *High School Dist. v. Lancaster County*, 60 Neb. 147, 82 N. W. 380, 83 Am. St. Rep. 525, and cases cited in the cross reference note thereto. As to the personal liability for taxes and assessments, see *Hanson County v. Gray*, 12 S. Dak. 124, 76 Am. St. Rep. 591, 80 N. W. 175;

monographic note to Richards v. Commissioners of Clay County, 42 Am. St. Rep. 655-661.

Licenses may be imposed for regulation or for revenue. A license is issued under the police power, but the exaction of a license fee, with a view to revenue, is an exercise of the power of taxation: See the monographic note to People v. Naglee, 52 Am. Dec. 331.

ESTATE OF RAMSAY v. PEOPLE.

[197 Ill. 572, 64 N. E. 549.]

OFFICIAL BONDS—Proof of Execution.—The acknowledgment of an official bond is prima facie evidence of its due execution, and, if no countervailing evidence is offered, proof of the signatures is unnecessary. (p. 178.)

OFFICIAL BONDS.—Copies of Official Bonds deposited with the Secretary of State, when certified and authenticated by his seal, are admissible in evidence in the same manner and with like effect as the originals. (p. 179.)

OFFICIAL BONDS.—The Duty of Approving an official bond by some representative of the government is due to the public, and not to the principal in the bond or his sureties. (p. 180.)

OFFICIAL BOND—Effect of Nonapproval.—The sureties on the bond of the warden of a penitentiary cannot escape liability because of the nonapproval of the bond by the governor. (p. 180.)

OFFICIAL BONDS—Presumption of Delivery.—When the bond of the warden of a penitentiary is approved by the commissioners thereof and deposited with the Secretary of State, the presumption is that it has been delivered. (p. 180.)

OFFICIAL BONDS.—No Formal Acceptance of an official bond is necessary, nor need there be written evidence of its acceptance and approval. (pp. 180, 181.)

OFFICIAL BONDS—Approval—Nonaction.—An official bond, delivered to the representative of the government, becomes a binding obligation, unless disapproved by him. His mere nonaction does not deprive the officer of power to act or release the sureties. (p. 180.)

OFFICIAL BONDS.—The Sureties on an officer's bond are liable for all duties imposed upon him within the scope of his office, whether required by laws enacted before or after the execution of the bond. (pp. 181, 182.)

OFFICIAL BONDS.—The Statute in Force when an official bond is executed constitutes a contract between the officer, his sureties, and the public. (p. 182.)

OFFICIAL BOND—Deposit in Insolvent Bank.—The warden of a penitentiary and his sureties are not absolved from liability when he deposits public funds in an insolvent bank which he supposes solvent, though his bond is conditioned only for the faithful performance of his duties as warden. (p. 184.)

OFFICIAL BONDS.—An Officer Becomes an Insurer of public funds coming into his hands when he executes a bond binding him to perform the duties of his office. (p. 184.)

OFFICIAL BOND—Common-Law Undertaking.—An Officer and His Sureties are Estopped to deny the validity of a bond under which he is allowed to receive public moneys. It will be obligatory as a common-law undertaking, unless prohibited by statute or public policy. (pp. 185, 186.)

OFFICIAL BONDS.—Where a Temporary Bond was given by the warden of a penitentiary, his new bond is binding on the sureties, irrespective of what became of the temporary one. (p. 186.)

OFFICIAL BONDS—Negligence of Other Officers.—The sureties of a public officer cannot be heard to say, in defense of their liabilities for money deposited by him in an insolvent bank, that other officers were negligent in allowing him to have control of it. (pp. 186, 187.)

LACHES is Not Imputable to the Government. (p. 187.)

This was a claim against the estate of one Ramsay by the commissioners of the Southern Illinois Penitentiary for an amount alleged to be due on the official bond of one Baker, as warden of the penitentiary, upon which bond Ramsay was one of the sureties. A judgment in favor of the claimants was rendered in the circuit court, which was affirmed in the appellate court. The present appeal is from such judgment of affirmance.

John G. Irwin and M. P. Murray, for the appellant.

Van Hoorebeke & Loudon, for the appellee.

580 **MAGRUDER, C. J.** The errors, assigned upon the record by the appellant, relate to the admission of evidence in the trial below, and to the holding and refusal of the propositions of law asked by the parties.

1. The first class of objections, made by the appellant to the action of the court below, relates to the execution of the bond sued upon. It is said by the appellant that there was no proof of the signatures to the bond; and section 65 of the act in regard to administration of estates is referred to, as showing that it was necessary **581** to prove the handwriting of the signatures to the bond. Such proof was unnecessary here, for the reason that section 1 of chapter 103 of the Revised Statutes in regard to official bonds provides that such bonds shall be "acknowledged before some officer authorized by law to take acknowledgments of instruments under seal," and that such acknowledgments shall be deemed and taken as prima facie evidence that the instrument was signed, sealed and acknowledged in the manner therein set forth; and it is therein provided that such acknowledgments shall have the same force and effect as evidence in all legal proceedings, as that given to deeds of con-

veyance of real estate. The bond here was acknowledged, and no proof was introduced by appellant to overcome the *prima facie* proof of execution made by such acknowledgment.

The objection is also made in the argument of counsel, that a mere certified copy of the bond was offered without proof of the loss of the original. The certified copy was not objected to upon this specific ground when it was offered upon the trial below, but upon other grounds hereinafter stated. For this reason the objection comes too late. But, independently of this consideration, section 7 of chapter 124 of the Revised Statutes in reference to the Secretary of State provides that copies of all bonds, legally deposited in the office of the Secretary of State, when certified by him and authenticated by his seal of office, shall be received in evidence in the same manner, and with the like effect, as the originals. The bond here was so certified and authenticated as required by the statute, and, therefore, the certified copy was properly received in evidence.

Objection was made to the introduction of the bond, upon the alleged grounds that it was not approved by the penitentiary commissioners, or the governor, and that it was not delivered in the lifetime of Ramsay. Section 8 of chapter 108 of the Revised Statutes, in relation ⁵⁸² to the penitentiary, provides, that "the warden, before entering upon the duties of his office, shall take and subscribe the oath or affirmation prescribed by section 25, article 5, of the constitution of this state. And he shall also enter into a bond to the people of the state of Illinois in the penal sum of fifty thousand dollars, with good and sufficient sureties to be approved by the governor and by the said commissioners, or a majority of them, conditioned for the faithful performance of the several duties, which now are, or may hereafter be, required of him by law, which said bond and oath or affirmation shall be deposited in the office of Secretary of State."

So far as the approval of the bond by the penitentiary commissioners is concerned, it is marked "approved" upon the face of it by the three commissioners—E. C. Kramer, W. V. Choisser, and John J. Schneider. It is not shown, however, that it was approved by the governor. But this makes no difference with the validity of the bond, so far as the sureties are concerned. The requirement, that an official bond shall be approved by some representative of the government, is for the purpose of furnishing some means by which the public may be assured that the bond tendered is sufficient, and is properly

executed. The duty of thus approving the bond is a duty which is due to the public, and not to the principal in the bond, or to his sureties. It follows "that where, by virtue of the bond, the officer has been inducted to the office, his sureties cannot escape liability for his defaults, because the bond was not approved by the proper officer, or was not approved at all": *Mechem's Public Offices and Officers*, secs. 311-313; *Green v. Wardwell*, 17 Ill. 278, 63 Am. Dec. 366. Baker assumed and entered upon the duties of warden of the penitentiary under the bond, executed by him on February 15, 1893, and, therefore, Ramsay, as one of his sureties, could not escape liability for Baker's defaults, because of the nonapproval of the bond by the governor. The same is true of Ramsay's estate. The ⁵⁸³ proof shows, that the bond was approved by the commissioners of the penitentiary, to whom it was presented soon after its execution, and that it was at once sent to Springfield to the Secretary of State. When it was thus approved, and deposited in the office of the Secretary of State, as required by law, the presumption is, that there was a delivery of it. It is true that the file-mark upon the original bond in the office of the Secretary of State bears date January 9, 1895, a date subsequent to the death of Ramsay; but there is nothing in the statute which requires the date of the filing of the bond to be indorsed upon it by the Secretary.

No formal acceptance of an official bond is required, in order to justify a recovery upon it against the sureties, nor is it necessary that there should be written evidence of its acceptance and approval, in order to bind the sureties. Parol evidence is admissible to show its approval: 17 Am. & Eng. Ency. of Law, 1st ed., 61; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Bartlett v. Board of Education*, 59 Ill. 364. Where an official bond is executed and delivered to the proper representative of the government, it becomes obligatory upon the parties signing it, unless it is disapproved by such representative. The latter's mere nonaction does not deprive the officer of the power to act as such. So here, Baker, as warden, was not deprived of the power to act, merely because of the nonaction of the governor in the matter of the approval of his bond. If the governor and penitentiary commissioners were not satisfied with the sureties upon the bond, they should have disapproved the bond, so that other sureties might be obtained. If this was not done, the bond became binding as an obligation to secure the rights of the public, so far as the sureties signing it

were concerned, from the moment of its delivery, as required by statute. The fact of the possession of the bond by the commissioners, even though it was not approved, amounted to a sufficient delivery and acceptance: ⁵⁸⁴ 17 Am. & Eng. Ency. of Law, 1st ed., 64. A bond takes effect from the date of its delivery, and if an officer, whose duty it is to receive and approve it, accepts it, it is *prima facie* good: *Leeper v. Hersman*, 58 Ill. 218; *Shaw v. Havekluft*, 21 Ill. 127. The fact that the officer acted, and was recognized as such, is sufficient evidence of the acceptance of the bond, and of the liability of the sureties for the nonperformance of the officer's duties: *Bank of United States v. Dandridge*, 12 Wheat. 64. A parol acceptance of it is competent and may be shown: *Bartlett v. Board of Education*, 59 Ill. 364. In the *Bartlett* case, where the board of education elected a treasurer and required him to give bond, which he did with security, and it was received by the board and acted upon by the parties, it was held that there was a sufficient approval of it without any indorsement thereof on the bond, or any entry thereof on their records; that such acts implied an approval, and that the provision of the statute, requiring an approval, was merely directory.

We are, therefore, of the opinion that there was a proper execution, delivery, acceptance and approval of the bond, so as to make it binding upon the parties signing it.

2. The question urged on our attention by the appellant, and raised by the propositions held for the appellee and refused for the appellant, is the question, whether or not Baker's liability under the bond sued upon was that of a mere bailee, or whether he was liable as insurer.

The proof is clear that he deposited money, belonging to the state, in the bank of Seiter & Co. at Lebanon, one hundred miles or more distant from the penitentiary at Chester. It is proven clearly that he had in this bank the sum of eleven thousand seven hundred and fifty dollars, being the amount of the present claim, when he retired from the office of the warden of the penitentiary. It is claimed on the part of the appellant that the bank of Seiter & Co. was reputed to be solvent, ⁵⁸⁵ and that Baker was guilty of no negligence in placing this fund in that bank. Upon the theory that he was a mere bailee, he was only required to exercise such ordinary care in the preservation and custody of the fund, as a prudent man would take of his own property: *Russell v. Koehler*, 66 Ill. 459. The contention, that Baker's liability was merely that

of a bailee is based largely upon the interpretation given by appellant's counsel to the language of the bond.

The condition of the bond is that, "if the said James D. Baker shall faithfully perform his duties as such warden, then this obligation to be void," etc. Stress is laid upon the fact, that the condition of the bond, in addition to requiring the principal therein to faithfully perform his duties as warden, does not also require him to promptly pay over and account for all public funds, coming into his hands. It is said that if, according to the terms of the bond, he had agreed to pay over all public funds coming into his hands, then he might be held liable to pay over the sum, even though his ability to do so was rendered impossible by events over which he had no control, but that, under the language of the bond as it actually is, he was only required to perform his duties to the extent of taking care of such public funds in the same manner as a bailee would be required under the law to care for the same.

It is true that the language of the bond here sued upon is not as full and complete as the language used in section 8 of the penitentiary act. By the terms of section 8, the warden is to enter into a bond, "conditioned for the faithful performance of the several duties, which now are, or may hereafter be, required of him by law." But we are of the opinion that the language of the bond must be construed to have the same meaning, as though the broader language of section 8 had been used. The sureties of an officer upon his official bond, conditioned for the faithful performance of the duties of the office, ⁵⁸⁶ are liable for all duties imposed upon him, which come within the scope of his office, whether required by laws enacted before or after the execution of the bond; and the statute in force when the bond is executed, constitutes a contract between the officer, his sureties and the public: *Governor of Illinois v. Ridgway*, 12 Ill. 14; *Compher v. People*, 12 Ill. 290; *Freudenstein v. McNier*, 81 Ill. 208. Therefore, the statute must be looked at in order to determine what the duties of the warden were, inasmuch as the statute upon this subject entered into and formed a part of the bond itself, as much as though its terms were therein expressed.

The statute herein referred to as the penitentiary act is the act of 1871, in relation to the penitentiary at Joliet; but on May 24, 1877, the legislature passed an act in reference to the Southern Illinois Penitentiary, the fourteenth section of which provides as follows: "In order that uniformity may prevail in the penitentiary system of this state, all laws and regulations

now in force for the government and management of the penitentiary at Joliet shall hereby, so far as practicable, apply to the government and management of said 'Illinois Southern Penitentiary': 3 Starr & Curtis' Annotated Statutes, 2d ed., 2941, 2953. Section 19 of the act of 1871 provides that "the warden shall attend to the fiscal concerns of the penitentiary, under the direction of said commissioners, and shall use his best endeavors to defray all the expenses of the penitentiary by the labor of the convicts; he shall superintend the labor of the convicts when employed in manufacturing or other work on behalf of the state, and shall act under the direction of said commissioners in making contracts for the employment of the labor of the convicts, and for furnishing the necessary supplies for their support, and in purchasing such raw material as may be required for manufacture by convict labor, and in taking charge of the articles so manufactured, and selling and disposing of the same for the benefit of the ⁵⁸⁷ state." Section 20 provides that "he shall render to said commissioners on the first day of each month a full and accurate statement of all moneys received by him and all sums of money expended by him during the preceding month, showing on what account received and expended, and shall accompany said report with proper vouchers for all such expenditures; which report shall be verified by the oath of the warden."

Section 35 provides that "the said warden, under the direction of the commissioners, shall be the custodian of all funds belonging to the said penitentiary, whether arising from the avails of the labor of the convicts, the sales of manufactured articles, or appropriations made by the general assembly, or otherwise": 3 Starr & Curtis' Annotated Statutes, 2946, 2951. Thus, by the terms of the statute itself, the warden of the penitentiary is required to attend to the fiscal concerns thereof, and is made custodian of all funds belonging thereto. By force of the statute governing the subject, the warden becomes in effect the debtor of the public. His liability being absolute and like that of other debtors, he is not relieved from liability, even though he is so unfortunate as to lose money deposited by him in a bank which he supposes to be solvent, but which turns out to be insolvent. In other words, he is not a mere bailee, and, therefore, cannot call upon the public to bear the loss: Mechem on Public Offices and Officers, secs. 297-302, inclusive.

A public officer "is liable upon his bond for the loss of public funds, deposited by him in a bank and lost through its failure, though the bank was reputed solvent, and such deposit was

necessary for the safety of the funds": *Meehem on Public Offices and Officers*, sec. 302; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *United States v. Prescott*, 3 How. 578. In other words, a public officer, when he executes a bond binding himself to perform the duties of his office, becomes insurer of the public funds coming into his hands, by virtue of the bond and the law which becomes ⁵⁸⁸ a part of the bond: *Boyden v. United States*, 13 Wall. 17; *The B. L. Harriman*, 9 Wall. 161; *United States v. Dashiell*, 4 Wall. 182; *United States v. Prescott*, 3 How. 578; *Commonwealth v. Comly*, 3 Pa. St. 372; *Muzzy v. Shattuck*, 1 Denio, 233; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Meehem on Public Offices and Officers*, secs. 298-302.

This doctrine prevails in the state of Illinois: *Thompson v. Board of Trustees*, 30 Ill. 99; *Swift v. Trustees of Schools*, 189 Ill. 584, 60 N. E. 44; *Oeltjen v. People*, 160 Ill. 409, 43 N. E. 610. In *Thompson v. Board of Trustees*, 30 Ill. 90, which was an action brought by the board of trustees of a township upon the bond of the township treasurer, it was held that township treasurers, under our statute, are made insurers of the funds coming to their possession, and that nothing can relieve them from their obligation to safely keep and pay over such funds but the act of God, or of the public enemy. In the latter case it was said: "The fact that the township treasurer is required to receive money, and enter it in his cash-book, implies, without any other special regulation, that he is to keep it, and being required to keep it, it follows he is to keep it safely. This is one of the duties of his office he has undertaken faithfully to discharge. Another duty, no less imperative, is that he will deliver to his successor in office all moneys in his hands as such township treasurer, which he could not do if he suffered it to be lost out of his hands, or it should be so lost by any accident. The undertaking is, that the money shall be in his hands. These duties he has undertaken to perform unconditionally. . . . We cannot discover a shade of difference between this and the case of *United States v. Prescott*, 3 How. 578. . . . As in that case, so here is an undertaking safely to keep the money by the very force of the language of the condition of the bond. . . . In no sense is this a case of bailment. The liability of the treasurer arises out of his official bond. He has made, by that bond, an express contract with the trustees, that he will keep safely the moneys which shall ⁵⁸⁹ come to his hands." So, in the case at bar, under a statute which pro-

vides that the warden shall be custodian of all funds belonging to the penitentiary, and shall render to the commissioners monthly a statement of all moneys received by him, and all moneys expended by him, the implication is that he is to keep such moneys, and as he is required to keep them, it follows that he must keep them safely.

In *Swift v. Trustees of Schools*, 189 Ill. 584, 60 N. E. 44, it was held that one who accepts the office of township treasurer takes upon himself the duty of safely keeping the moneys of the township, which come into his hands, and of disbursing them pursuant to law, and that he and his sureties cannot be excused from making good a deficiency resulting from the failure of the bank, where the funds were deposited, although he supposed the bank to be solvent. In *Swift v. Trustees of Schools*, 189 Ill. 584, 60 N. E. 44, the case of *Thompson v. Board of Trustees*, 30 Ill. 90, was referred to, and indorsed, and quoted from: *Muzzy v. Shattuck*, 1 Denio, 233; *Commercial Bank v. Hughes*, 17 Wend. 97.

Even, however, if Baker should be regarded as a mere bailee, the proof in this case does not show that he exercised the ordinary care imposed by the law upon a bailee. The proof tends to show that Baker, who had been a partner of Seiter, knew, when he placed the money of the state in Seiter's bank, that the bank was, if not actually insolvent, at any rate in an unsound condition. There is testimony tending to show that this money and other moneys of the state were put into the hands of Seiter for the purpose of preventing the failure of his bank as long as possible. The evidence also tends to show that Baker was aware that Seiter intended to make an assignment some time before he did actually make an assignment, and that, notwithstanding his knowledge of the condition of the bank of Seiter & Co., he allowed the funds of the state to remain therein, and took no steps, until it was too late, to withdraw them ⁵⁹⁰ therefrom. It being established beyond controversy that Baker received the money of the state for which the present claim is presented, and failed to turn it over to his successor, or to the commissioners of the penitentiary, the burden of proof was upon him, or his sureties, to show why he so failed to pay over the funds in his hands. Under the authorities the fact that he had deposited it in an insolvent bank is no excuse, even though the bank was reputed to be solvent.

Where a public officer gives a bond, under which he is allowed to receive moneys, and does actually receive them by

virtue of his office, he and his sureties are estopped from denying the validity of such bond when sued for breach of its condition. It will be obligatory as a common-law undertaking, unless prohibited by statute, or opposed to public policy: *Coons v. People*, 76 Ill. 383; *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745; *Meehem on Public Offices and Officers*, sec. 296.

3. Some other points are made by the appellant, as arising upon the refusal of propositions of law submitted, a few of which will be noticed. Much stress is laid by the appellant upon the fact of the alleged destruction of what is called the Ford bond, referred to in the statement preceding this opinion. When Baker was first appointed, he presented to the penitentiary commissioners at Springfield in the latter part of January, 1893, a bond, signed by himself, Ford, Seiter, and Reuter. This bond was acknowledged by Seiter only. Baker explained to the commissioners that Ramsay was absent from Springfield, and asked them to accept the bond temporarily, so that he could assume the duties of his office at once. The proof tends to show that the bond was so accepted with the understanding that another would be given shortly thereafter, and, in less than thirty days, another bond, signed by Ramsay instead of Ford, and which is the bond here sued upon, was presented to the commissioners, and by them approved and sent to Springfield. ⁵⁹¹ Upon cross-examination Ford testified that Baker told him that, shortly after he gave the new bond, this old bond had been destroyed. Whether it was destroyed or not is not clearly established, but it would make no difference, so far as the liability of the estate of Ramsay in this suit is concerned. The second bond, executed by Ramsay, and accepted and approved by the commissioners, was a good and valid bond as against Ramsay, irrespective of the question, what became of the temporary bond executed in the first place. Whether Ford did, or did not, give notice, under section 10 of the statute in regard to official bonds (2 Starr & Curtis' Annotated Statutes, 2d ed., 2833), the fact is, that a new bond was given, and, under section 11 of the last-named act, the sureties upon the new bond were liable for all the official delinquencies of Baker as warden, whether of omission or commission, which occurred after the approval of such new bond. The proof shows that the first transaction which Baker, as warden, had with Seiter's bank occurred on July 15, 1893, several months after the giving of the bond signed by Ramsay. The official delinquency, with which Baker is charged in the present suit, was the failure to pay over the sum of eleven thousand seven hundred and fifty

dollars, which he deposited in the bank of Seiter & Co., and as this deposit was made long after February 15, 1893, when the bond here sued upon was executed, Ramsay and his estate became liable on such bond.

It is said that the commissioners of the penitentiary, who appointed Baker to the office of warden, were guilty of negligence, not only in permitting him to have money in his possession, which it was unnecessary to expend in carrying on and maintaining the penitentiary, but also in allowing him to deposit his money in the banking-house of Seiter & Co. No error was committed in refusing the proposition of law, which embodied this idea, because "an officer, who has received money for and on account of his principal, cannot, in general, when called ⁵⁹² upon to pay it over, defend upon the ground that it was money which his principal had no right to obtain, procure, or receive. And it is held that his sureties are equally estopped": Mechem on Public Offices and Officers, sec. 295; *Lovington v. Board of Trustees*, 99 Ill. 564. It is also well settled that the sureties, in an action on an official bond, cannot be heard to say that some other officer has been negligent, or failed to perform some duty, and thus escape liability: *Stern v. People*, 102 Ill. 540; *Campbell v. People*, 154 Ill. 595, 39 N. E. 578; *Spindler v. People*, 154 Ill. 637, 39 N. E. 580. In *Stern v. People*, 102 Ill. 550, we said: "Statutory directions to public officers are given for the security and convenience of the government, and to regulate the conduct of its officers, but being directory, they form no part of the contract with the surety, and hence sureties on bonds . . . cannot plead the negligence or failure of public officers to require their principal to render an account, or to remove him for neglect, as required of such officers by law, as a defense to their liability, upon a subsequent breach of his bond."

A proposition of law, asked by the appellant, was also refused, holding that, by reason of delay in obtaining satisfaction of the debt sued for, the estate of Ramsay has been released from liability. All that need be said in reply to this contention is that, as a general principle, laches is not imputable to the government. This maxim is said by Judge Story to be founded upon "a great public policy." "The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of

all its securities": *Mechem on Public Offices and Officers*, sec. 308; *United States v. Kirkpatrick*, 9 Wheat. 720. The claim here sued upon is sued in the name of the people of the state of Illinois for the use of the commissioners ⁵⁹³ of the Southern Illinois Penitentiary, and the money sought to be recovered belongs to the government of Illinois.

The judgment of the appellate court is affirmed.

WHEN AN OFFICIAL BOND BECOMES BINDING ON THE SURETIES, AND WHAT IRREGULARITIES FAIL TO RELIEVE THEM FROM LIABILITY. ,

- I. When Bond Takes Effect.**
 - a. Dates from the Delivery.
- II. Irregularities in the Delivery, Approval, and Filing.**
 - a. Necessity of Delivery.
 - b. Of Filing and Recording.
 - c. Irregularity in Approval.
 - d. Necessity of Acceptance.
 - e. Of Justification of Sureties.
- III. Defects and Irregularities in the Instrument.**
 - a. Time of Execution.
 - b. Materiality of Form.
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 1. Omission of Principal to Sign.
 2. Signing by Surety on Condition that Others Sign.
 - A. Effect of in General.
 - B. Notice of the Condition.
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 - e. Of Revenue Stamps.
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 - g. Reciting Erroneous Date.
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 - A. Binding Effect on Sureties.
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IV. Alterations and Forgeries.

- a. Alterations in General.
- b. Filling of Blanks.
- c. Spoliation or Alteration.
- d. Forgeries.

V. Eligibility and Title of Principal to Office.

- a. Effect of Ineligibility.
- b. Omission to Take Oath or Sue Out Commission.
- c. Invalidity of Title—De Facto Officer.

VI. Negligence and Wrong of Other Officers.

- a. No Defense to Sureties.

I. When Bond Takes Effect.

a. **Dates from the Delivery.**—An official bond takes effect, as a rule, from the date of its delivery and acceptance, and not from the date written therein. And the date of delivery may be shown, when important, whether it be at a time before or after the written date, or whether the written date has been omitted: *Bruce v. State*, 11 Gill & J. (Md.) 382; *Thomas v. Bleakie*, 136 Mass. 568; *United States v. Le Baron*, 19 How. 73; *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. Rep. 682. But if a bond is intrusted by a surety, on the day of its date, which is several days before the expiration of a term that the principal is then serving, to the principal, who delivers it to the obligee on the day when a new term of office begins, the recitals of the instrument being equally applicable to either term, it cannot be ruled as a matter of law, in an action against the surety for a breach of the bond occurring during the second term, that the bond took effect so as to bind him from the date of its delivery by the principal to the obligee: *Thomas v. Bleakie*, 136 Mass. 568. In case a bond is altered after delivery by the addition of further sureties, and again delivered, there is, in effect, a delivery of a new bond, which will take effect as such from the date of the last delivery: *State v. Paxton* (Neb.), 90 N. W. 983.

II. Irregularities in the Delivery, Approval, and Filing.

a. **Necessity of Delivery.**—A bond, given for the faithful performance by the principal of his duties as a public officer has no operation until delivered: *People v. Van Ness*, 79 Cal. 85, 12 Am. St. Rep. 134, 21 Pac. 554. And it is not delivered until it has passed beyond the dominion, control, and authority of the makers, and is no longer subject to recall: *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, 81 N. W. 383. When, however, an official bond is signed by the obligors, approved by the proper officers, and filed in the office required by law, it is executed and delivered to the people of the state: *Sacramento County v. Bird*, 31 Cal. 66.

b. **Of Filing and Recording.**—The failure to record an official bond does not invalidate it: *Whitehurst v. Hickey*, 3 Martin, N. S. (La.), 589, 15 Am. Dec. 167; *McLean v. Buchanan*, 53 N. C. 444; and

when no separate book is kept, registry in the book of mortgages is sufficient: *Board of School Directors v. Judice*, 39 La. Ann. 896, 2 South. 792. The statutes quite generally require official bonds to be filed and provide that a failure to file them with the proper person or persons within the time prescribed will be deemed to create a vacancy in the office. These statutes, however, are directory and not mandatory. The failure to deliver a bond for filing within the time limited, though it may render the principal liable to a proceeding for the forfeiture of his office, does not of itself operate to remove him from office, nor discharge his sureties from liability. Especially is this true when, with the express and implied authority of the sureties, the bond is approved and delivered after the right to declare a forfeiture of the office has occurred because such bond was not filed within the statutory period: *Sprowl v. Lawrence*, 33 Ala. 674; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Board of Commissioners v. Johnson*, 124 Ind. 145, 19 Am. St. Rep. 88, 24 N. E. 148; *State v. Texas County Court*, 44 Mo. 230; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, 81 N. W. 383; *Dutton v. Kelsey*, 2 Wend. 615; *Skellinger v. Yendes*, 12 Wend. 306; *State v. Toomer*, 7 Rich. (S. C.) 216; *McFarlane v. Howell* (Tex. Civ. App.), 43 S. W. 315. Compare *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261, 22 Atl. 8.

c. Irregularity in Approval.—The approval and acceptance of an official bond by the officers designated by law is, ordinarily, essential to its becoming operative and obligatory: *Fletcher v. Leight*, 4 Bush (Ky.), 303; *Commonwealth v. Magoffin*, 15 Ky. Law Rep. 775, 25 S. W. 599; *Rounds v. Mansfield*, 38 Me. 586; *State v. Jarrett*, 17 Md. 309; *O'Marrow v. Port Huron*, 47 Mich. 585, 11 N. W. 397; *Postmaster General v. Norvell*, Gilp. (U. S.) 106, Fed. Cas. No. 11,310. However, statutes providing that official bonds shall be approved, and limiting the time in which it may be done, are directory merely. Moreover, they are for the convenience, security, and protection of the public, and not directly for the benefit of the principal in the bond and his sureties. If a bond is delivered for approval, it becomes a binding obligation, unless actually disproved. A dereliction of duty on the part of the officers appointed by law to pass upon the sufficiency of the security, and approve or reject it, cannot be taken advantage of by the bondsmen. If they fail to act in the manner or time prescribed, or if they fail to act at all, or if the wrong officers act, the sureties are, nevertheless, bound, when their principal is inducted into office and proceeds to act and to assume to himself the privileges and authority appertaining thereto. If the irregularity is such that the instrument cannot be upheld as a statutory bond, it will at least be binding as a common-law obligation: *Sprowl v. Lawrence*, 33 Ala. 674; *Auditor v. Woodruff*, 2 Ark. 73, 33 Am. Dec. 368; *Taylor v. Auditor*, 2 Ark. 174; *People v. Scannell*, 7 Cal. 432; *People v. Edwards*, 9 Cal. 286; *People v. Evans*, 29 Cal. 429; *People v. Huson*, 78 Cal. 154, 20 Pac. 369; *Green v. Wardell*, 17 Ill. 278, 63 Am. Dec. 366; *Bartlett*

v. Board of Education, 59 Ill. 364; *Ladd v. Board of Trustees*, 80 Ill. 233; *Ashkum v. Lake*, 12 Ill. App. 25; *Clark v. State*, 7 Blackf. (Ind.) 570; *Mowbray v. State*, 88 Ind. 324; *Boone County v. Jones*, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155; *Held v. Bagwell*, 58 Iowa, 139, 12 N. W. 226; *McCracken v. Todd*, 1 Kan. 148; *Combs v. Breathitt Co.*, 18 Ky. Law Rep. 809, 38 S. W. 138; *Board of School Directors v. Judice*, 39 La. Ann. 896, 2 South. 792; *Apthorp v. North*, 14 Mass. 167; *People v. Johr*, 22 Mich. 461; *Village of Evart v. Postal (Mich.)*, 49 N. W. 53; *Marshall v. Hamilton*, 41 Miss. 229; *Jones v. State*, 7 Mo. 81, 37 Am. Dec. 180; *Moore v. State*, 9 Mo. 334; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *State v. Paxton (Neb.)*, 90 N. W. 983; *Drew v. Morrill*, 62 N. H. 23; *State v. Sooy*, 38 N. J. L. 324; *Village of Warren v. Phillips*, 30 Barb. 646; *Place v. Taylor*, 22 Ohio St. 317; *Musselman v. Commonwealth*, 7 Pa. St. 240; *Treasurers v. Stevens*, 2 McCord (S. C.), 107; *Wright v. Leath*, 24 Tex. 24; *Poer v. Brown*, 24 Tex. 34; *State v. Proudfoot*, 38 W. Va. 736, 18 S. E. 949.

d. Necessity of Acceptance.—The delivery and acceptance of the bond of a public officer are necessary to its becoming a valid obligation. Furthermore, it should be observed that the approval of a bond does not work its acceptance: *Commonwealth v. Magoffin*, 15 Ky. Law Rep. 775, 25 S. W. 599; *Holt County v. Scott*, 53 Neb. 176, 73 N. W. 681; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, 81 N. W. 383. It has been held that a bond not accepted within the time limited by law is without force and effect: *Commonwealth v. Yarbrough*, 84 Ky. 496, 2 S. W. 68. But compare *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, 81 N. W. 383; and “Irregularity in Approval,” ante, p. 190.

e. Of Justification of Sureties.—The fact that a surety on a bond conditioned for the faithful performance of his duties by a public officer does not justify will not relieve him from liability, if the bond has been accepted without such justification: *State v. McDonald (Idaho)*, 40 Pac. 312; *Taylor County v. King*, 73 Iowa, 153, 5 Am. St. Rep. 666, 34 N. W. 774.

III. Defects and Irregularities in the Instrument.

a. Time of Execution.—A bond executed by a public officer and his sureties after the time limited by the statute is not void: *Westerhaven v. Clive*, 5 Ohio, 136. When the proper authorities have not required it sooner, the sureties are bound: *Weston v. Sprague*, 54 Vt. 395. If such bonds cannot be upheld as statutory bonds, they are at least good as common-law obligations: *Stephens v. Crawford*, 1 Ga. 574, 44 Am. Dec. 680. It has been held, however, that where a treasurer gives a bond over a year after his term of office began, containing no words of relation, his sureties are answerable for only such funds as he then has in his hands, or thereafter receives: *State v. Polk*, 14 Lea (Tenn.), 1.

b. Materiality of Form.—It is elementary that the contract of a surety on an official bond is to be construed strictly. To the extent, in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further: *Cooper v. People*, 85 Ill. 417; *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261, 22 Atl. 8; *Lowe v. Guthrie*, 4 Okla. 287, 44 Pac. 198; *McRea v. McWilliams*, 58 Tex. 328; *Miller v. Stewart*, 9 Wheat. 680. Notwithstanding sureties are entitled to stand on the very terms of their undertaking, courts are inclined to disregard objections purely technical in their character: *State v. Fredericks*, 8 Iowa, 553. A bond is not invalid because artificially drawn. It need not in all respects conform to the statute as to form, but it is sufficient if conforming thereto substantially, and not varying in any matter to the prejudice of the parties. Though the condition is not literally that prescribed by law, if it contains the substance, the sureties are bound: *People ex rel. Dorsey v. Smyth*, 28 Cal. 21; *Smith v. Taylor*, 56 Ga. 292; *People v. Slocum*, 1 Idaho, 62; *Yeakle v. Winters*, 60 Ind. 554; *McCracken v. Todd*, 1 Kan. 148; *Trescott v. Moan*, 50 Me. 347; *Wendell v. Fleming*, 8 Gray, 613; *Boykin v. State*, 50 Miss. 375; *Wimpey v. Evans*, 84 Mo. 144; *Mayor v. Evans*, 31 N. J. L. 342; *McEachron v. Township of New Providence*, 35 N. J. L. 528; *Village of Warren v. Philips*, 30 Barb. 646; *Supervisors of Allegany County v. Van Campen*, 3 Wend. 48; *Skellinger v. Yendes*, 12 Wend. 306; *Jones v. Newman*, 36 Hun, 634; *Place v. Taylor*, 22 Ohio St. 317.

A bond requiring the faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties of the officer were inserted in it: *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873, 7 Pac. 650. See, also, the principal case, ante, p. 177.

A bond is not void by reason of being in form joint, instead of being joint and several as required by statute: *Perkins County v. Miller*, 55 Neb. 141, 75 N. W. 577. But if the statute requires a joint and several bond, and an undertaking is executed binding each surety only for an aliquot part of the penalty, it has been held that the sureties cannot be held beyond the terms of their contract: *State v. Polk*, 14 Lea (Tenn.), 1.

c. Sufficiency of Signatures.

1. Omission of Principal to Sign.—There are cases holding that the failure of the principal in an official bond to sign it does not relieve the sureties from liability thereon: *Pina County v. Snyder* (Ariz.), 44 Pac. 297; *State v. McDonald* (Idaho), 40 Pac. 312; *City of Deering v. Moore*, 86 Me. 181, 41 Am. St. Rep. 534, 29 Atl. 988; *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. 958 (not an official bond); *O'Hanlon v. Scott*, 35 N. Y. Supp. 31, 89 Hun, 44; *State v. Bowman*, 10 Ohio, 445; *Hall v. Lafayette County*, 69 Miss. 529, 13 South. 38; as where they sign the instrument on the condition that he will not deliver it without his signature, the obligee having no actual

notice of the condition: *Trustees v. Sheik*, 119 Ill. 579, 59 Am. Rep. 830, 8 N. E. 189. In this last case, and some, if not all, of the others, the principal's name appeared in the body of the bond. These decisions are based on the ground that the liability of the principal is fixed by law, and that his omission to affix his signature does not affect substantially the rights of the sureties. As is said in the last case: "The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned. In what way are the sureties injured by the omission of the principal obligor to sign the bonds? If they are compelled to pay the trustees any sum of money, they can recover the amount back from him whether he signed the bond or not. So far as they are concerned, they are in as good a condition as if Reitz, the treasurer, had properly executed the bond."

Probably sureties in an official bond may, under some circumstances, be bound, notwithstanding their principal's signature is wanting, and his name appears in the body of the undertaking as the principal obligor. We have little hesitancy in saying, however, that such a bond is *prima facie* invalid and not binding on the sureties. There appears no valid reason why such an obligation should, ordinarily, be enforced. The fact that the principal has not affixed his signature should put the obligee on inquiry. He has it in his power to require the principal to complete the bond, and thereby protect himself as well as the sureties. If he does not do so, he has no reason to complain if the bond is not upheld. Nor is the assertion that the sureties lose nothing by the failure of the principal to sign the obligation true. His omission may affect their rights in most important respects. They may have a right to be exonerated or reimbursed the amount they are compelled to pay, whether he assigns the bond or not. Yet, "if he had signed the bond, he would not only have been estopped by the judgment from contesting his liability, but the sureties could require recourse to his property to satisfy the execution before seizure of theirs. These are not barren advantages." "It affords a surety but little comfort to assure him that he can collect money he has been compelled to pay for a principal by the process of long and expensive litigation, when this could have been avoided by requiring the principal to do what he virtually contracted to do by inserting his name as principal in the instrument, and by requiring the obligee to see that it is done—see that the instrument he accepts is complete by being executed by all the parties named as such therein": *Wild Cat Branch v. Ball*, 45 Ind. 213; *Johnston v. Kimball Township*, 39 Mich. 187, 33 Am. Rep. 372; *Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Gay v. Murphy*, 134 Mo. 98, 56 Am. St. Rep. 496, 34 S. W. 1091; *Board of Education v. Sweeney*, 1 S. Dak. 642, 36 Am. St. Rep. 767, 48 N. W. 302.

In two early California cases it is held that no recovery can be had on a joint bond of the principal and sureties, where not signed by

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the principal. These cases seem to attach importance to the fact that the obligation is joint and not joint and several: *Sacramento v. Dunlap*, 14 Cal. 421; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758. We do not think a distinction can be drawn between these two classes of bonds, but that both alike are *prima facie* invalid: *Weir v. Mead*, 101 Cal. 125, 40 Am. St. Rep. 46, 35 Pac. 567; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. 751, 43 Am. St. Rep. 487, and note.

If an officer writes his name in the body of a paper prepared by himself as his official bond, though he does not intend it as his final signature or subscription, and the writing is delivered, approved, and accepted, it is binding upon him and his sureties, notwithstanding he inadvertently omits to attach his final signature at the bottom of the instrument: *McLeod v. State*, 69 Miss. 221, 13 South. 268; *State v. Hill*, 47 Neb. 456, 66 N. W. 541.

2. Signing by Surety on Condition that Others Sign.

A. Effect of, in General.—It is a well-established principle of law that where a surety signs an official bond and leaves it in the hands of the principal to be delivered only on the condition that it be signed by another surety, and the principal delivers the bond to the obligee without complying with the condition, the surety is not bound if the obligee has notice, actual or constructive, of the conditional agreement. If, however, the bond on its face is complete, and the obligee has no notice of the understanding between the principal and surety, nor information sufficient to put him on inquiry, the surety is bound. By the act of giving his principal the possession and control of the bond after affixing his signature thereto, the surety constitutes the principal his agent to deliver the instrument to the proper authorities. And if some one is to suffer because he exceeded his power in delivering the bond without securing the signature of one who, it was understood, was to be one of the obligors, the loss must fall on the surety. It is a case in which the surety must run the risk of the fraud of his own agent: *Crawford v. Foster*, 6 Ga. 202, 50 Am. Dec. 327; *Smith v. Peoria County*, 59 Ill. 412; *Comstock v. Gage*, 91 Ill. 328; *Stern v. People*, 102 Ill. 540; *State v. Pepper*, 31 Ind. 76 (overruling *Pepper v. State*, 22 Ind. 399, 85 Am. Dec. 430); *State v. Garton*, 32 Ind. 1, 2 Am. Rep. 315; *State v. Blair*, 32 Ind. 313; *Carroll County v. Ruggles*, 69 Iowa, 269, 58 Am. Rep. 223, 28 N. W. 590; *Taylor County v. King*, 73 Iowa, 153, 5 Am. St. Rep. 666, 34 N. W. 774; *Beaton County Sav. Bank v. Boddicker*, 105 Iowa, 548, 67 Am. St. Rep. 310, 75 N. W. 632; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *State v. Peck*, 53 Me. 284; *Lewiston v. Gagne*, 89 Me. 395, 56 Am. St. Rep. 432, 36 Atl. 629; *McCormick v. Bay City*, 23 Mich. 457; *Board of Education v. Robinson*, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105; *State v. Gonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 13 S. W. 758; *State v. Potter*, 63 Mo. 212, 21 Am. Rep. 440; *Russell v. Freer*, 56 N. Y. 67 (questioning *People v. Bostwick*, 32 N. Y. 445); *State v. Welbes*, 12 S. Dak. 339, 81 N. W. 629; *Quarles v. Governor*,

10 Humph. (Tenn.) 122; McFarlane v. Howell, 16 Tex. Civ. App. 246, 43 S. W. 315; Fletcher v. Austin, 11 Vt. 448, 34 Am. Dec. 698; King County v. Ferry, 5 Wash. 536, 34 Am. St. Rep. 880, 32 Pac. 538; Dair v. United States, 16 Wall. 1.

B. Notice of the Condition.—Where sureties sign a bond on the condition that they shall not be bound unless others named therein also sign, the fact that those whose names appear in the bond have not signed it is notice to the obligee or accepting officer of the condition upon which the instrument was executed: State v. Wallis, 57 Ark. 64, 20 S. W. 811; Thomas v. Bleakie, 136 Mass. 568; Ward v. Churn, 18 Gratt. (Va.) 801, 98 Am. Dec. 749; Pawling v. United States, 4 Cranch, 219; Duncan v. United States, 7 Pet. 435. In case one of them does not sign, and his name is erased from the body, the surety who signed conditionally is released: State v. Churchill, 48 Ark. 440, 3 S. W. 352, 880. And it may be said that when the principal has proposed certain persons whose names are set out in the bond, each one as he signs has the right to rely upon the proper officer causing it to be fully and properly signed: Commonwealth v. Magoffin, 15 Ky. Law Rep. 775, 25 S. W. 599.

But a bond signed by the principal and several sureties, and perfect on its face, except that several scrolls below the signatures are left unsigned, when delivered in violation of an agreement to obtain other signatures, is binding on the sureties. The unsigned scrolls are not enough to put the obligee on inquiry: Nash v. Fugate, 32 Gratt. (Va.) 595, 34 Am. Rep. 780. So, also, the fact that after the last signature there is a vacant line with the word "Surety" following it is not such notice of incompleteness as will release the sureties: Crystal Lake Tp. v. Hill, 109 Mich. 246, 67 N. W. 121. Knowledge, on the part of one member of the approving board, of the conditional signing of a bond, has been held not notice to the board: Stevenson v. Bay City, 26 Mich. 44; Stoner v. Keith County, 48 Neb. 279, 67 N. W. 311. In the Michigan case, the officer possessing the knowledge was also a surety on the bond, and hence considered incapacitated to approve it.

d. Omission of Seals.—The fact that in executing a bond, given for the faithful performance of official duties, the sureties omit to put their seals to it, does not relieve them from liability. The instrument is not, technically, a bond. Still the requirement of a seal is merely technical, and its omission does not affect the substance of the instrument. When the parties assume to comply with the statute in such a case, it does not lie with them to object that they have omitted some mere matter of form, the substance of the instrument being what the statute requires: Boothbay v. Giles, 68 Me. 160; Board of County Commrs. v. Tower, 28 Minn. 45, 8 N. W. 907; Skellinger v. Yendes, 12 Wend. 306; Fairport Union Free School v. Fonda, 77 N. Y. 350; First Nat. Bank v. Briggs, 69 Vt. 12, 60 Am.

St. Rep. 922, 37 Atl. 231; *United States v. Linn*, 15 Pet. 290. The absence of a seal against one surety's name does not affect the liability of the others: *Templeton v. Commonwealth* (Pa. St.), 8 Atl. 167; and the failure of the principal to place a seal opposite his name will not defeat a recovery against the sureties, if the defect is suggested in the complaint: *Sacramento County v. Bird*, 31 Cal. 67. It is well said in *State v. Young*, 23 Minn. 551, 557, that "at the present, the distinction between sealed and unsealed instruments is arbitrary, meaningless, and unsustained by reason. The courts have, for nearly a century, been gradually doing away with the former distinctions between these two classes of instruments, and if they have not yet wholly disappeared, it simply proves the difficulty of disturbing a rule established by long usage, even after the reason for the rule has wholly ceased to exist."

e. Of Revenue Stamps.—A stamp tax imposed by Congress on bonds required by a state of its officers is, in necessary legal effect, a tax upon the right of such officers to qualify, and upon the exercise by the commonwealth of its governmental functions. The fact that the tax is required before the officers qualify is not important. Manifestly, therefore, the validity of a bond given by an officer to the state is not affected by the omission therefrom of a United States revenue stamp: *State v. Garton*, 32 Ind. 1, 2 Am. Rep. 315; *Bettman v. Warwick*, 108 Fed. 46. In this last case, the bond of a notary public, appointed under the laws of a state, by the governor, is held to be exempt from the tax imposed by the war revenue act of 1898, within the meaning of the proviso to schedule "A," exempting states in the exercise of governmental functions.

f. Of Witnesses and Attestation.—An official bond is good without any witness, when the statute requires none: *Pierce v. Richardson*, 37 N. H. 306. And a statutory requirement of attestation is directory merely. Furthermore, it is not intended for the benefit of the sureties, and forms no inducement to their entering into the contract, but it is intended to multiply the facilities by which liability can be rendered certain. The omission of this formality will not, therefore, affect the liability of the sureties: *State v. Winfree*, 12 La. Ann. 643; *State v. Hampton*, 14 La. Ann. 725; *Board of School Directors v. Judice*, 39 La. Ann. 896, 2 South. 792; *Young v. State*, 7 Gill & J. (Md.) 253.

g. Reciting Erroneous Date.—When an officer has been inducted into office and has assumed his duties in a public capacity, the sureties on his bond cannot escape liability for his acts on the ground that the date recited in the bond is erroneous. The date of the bond is not an essential. It takes effect from the day of delivery, which date may be shown whenever material: *Pierce v. Richardson*, 37 N. H. 306; *State v. Baird* (N. C.), 21 S. E. 668.

h. Omissions from Body of Instrument.—The bond of a public officer is obligatory on the sureties, at least as a common-law obligation, if not as a statutory bond, which omits the name of one, or the names of all, the sureties from the body of the instrument: *Hodgkin v. Holland*, 34 Ark. 203; *Moore v. McKinley*, 60 Iowa, 367, 14 N. W. 768; *Stewart v. Carter*, 4 Neb. 564; which leaves the principal's name in the instrument blank: *Rader v. Davis*, 5 Lea (Tenn.), 536; which has only one security when the statute requires two: *Justices v. Ennis*, 5 Ga. 569; which does not recite that the officer is county treasurer (when he is such), or was elected to that office: *Wilson v. Cantrell*, 19 Ala. 642; which names no obligee: *State v. Wood*, 51 Ark. 205, 10 S. W. 624; which leaves the name of the township blank, the officer being a constable: *State v. Kirby*, 9 Mo. 298; which does not specify or designate the term for which the principal is elected or appointed, though the statute fixes the term of office: *Perkins County v. Miller*, 55 Neb. 141, 75 N. W. 577; *City of Camden v. Greenwald*, 65 N. J. L. 458, 47 Atl. 458; which fails to direct the amount of the penalty: *State v. Lynch*, 6 Blackf. (Ind.) 395; which omits to recite to whom the officer, a collector, shall pay over the taxes: *Miller v. Moore*, 2 Humph. (Tenn.) 421; or which omits the word "court" after the word "circuit" in the bond of the clerk of such court: *People v. Barnwell*, 41 Ill. App. 617.

1. Naming Wrong Obligee.

1. Effect of, in General.—A mistake in the name of the obligee in an official bond does not vitiate it. For example, a bond given to the state, instead of the county, as required by statute; or to the county commissioners, instead of to the state; or to the township trustees, instead of to the township treasurer; or to the selectmen of the town, instead of to the town—will be upheld as a common-law undertaking if not good as a statutory bond: *Anderson v. Brumby* (Ga.), 42 S. E. 77; *Fanrote v. State*, 110 Ind. 463, 11 N. E. 472; *Charles v. Haskins*, 11 Iowa, 329, 77 Am. Dec. 148; *Lord v. Lancey*, 21 Me. 468; *Bay County v. Brock*, 44 Mich. 45, 6 N. W. 101; *Huffman v. Koppelkom*, 8 Neb. 344, 1 N. W. 243; *Koppelkom v. Huffman*, 12 Neb. 95, 10 N. W. 577; *Horn v. Whittier*, 6 N. H. 88; *Barrett v. Reed*, 2 Ohio, 409; *King v. Ireland*, 68 Tex. 682, 5 S. W. 499; *Lewis v. Stout*, 22 Wis. 234. So, a bond given to an officer, which fails to designate his official character, will be upheld: *Smith v. Wingate*, 61 Tex. 54. The "People of the State of Colorado" and the "State of Colorado" are equivalent expressions when used in official bonds: *Cooper v. People*, 28 Colo. 87, 63 Pac. 314. To the same effect is *Tervis v. Randall*, 6 Cal. 632, 65 Am. Dec. 547.

2. Actions to Enforce — Parties.—Such bonds, it has been held, do not authorize summary proceedings allowed by statute thereon: *Miller v. Montgomery County Commrs.*, 1 Ohio, 271.

The question of parties, in case of an action on an official bond running to the wrong obligee, is not free from perplexities. It has been held that, in an action on a bond given to the territory instead of to the county commissioners, the county, by its commissioners, is the proper party plaintiff, it being the real party in interest: *Jefferson Co. Commissioners v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462, citing *Taaffe v. Rosenthal*, 7 Cal. 514; *Thornburgh v. Hand*, 7 Cal. 554. And where a bond runs to the county instead of to the state, an action thereon may be brought in the name of the state for the use of a person injured: *State v. Barnes*, 10 S. Dak. 306, 73 N. W. 80. So a bond made payable to the supervisors of the town, instead of to the town by its name, may be sued on by the town: *Town of Platteville v. Hooper*, 63 Wis. 381, 23 N. W. 581. To the same effect is *Custer County v. Albien*, 7 S. Dak. 482, 64 N. W. 533. In the Wisconsin case it was contended that, the instrument being merely a voluntary obligation, the supervisors were the proper parties plaintiffs. The court admitted that this was the rule at the common law, but not under a statute providing that every action must be prosecuted in the name of the real party in interest.

An action on a bond of this kind may, it has been decided, be brought in the name of the obligee named therein, or his personal representative against the obligors by any person injured by a breach of its conditions: *State v. Horn*, 94 Mo. 162, 7 S. W. 116; *Horn v. Whittier*, 6 N. H. 88; *Jones v. Wiley*, 4 Humph. 146. Though it is held that an action cannot be prosecuted by the obligee, if he is not an officer authorized by law to institute and prosecute proceedings in his representative capacity. In the event of his being without such authority, the bond may, perhaps, be construed, it is said, as an obligation given to the payee in his individual capacity, and enforceable by a suit brought in his name and right as a private citizen for the use of the persons aggrieved: *Anderson v. Brumby* (Ga.), 42 S. E. 77.

The authorities seem to be uniform in holding that an official bond, good only as a common-law obligation, because made payable to an officer other than the one designated by law, is not enforceable at the suit of the successor in office of the obligee named: *Calhoun v. Lunsford*, 4 Port. (Ala.) 345; *Stevens v. Hay*, 6 Cush. 229; *Justices v. Armstrong*, 14 N. C. 284; *Stuart v. Lee*, 3 Call (Va.), 422. Thus, it is held that a bond given to the governor and his successors in office, instead of to the state, as required by statute, is not a statutory bond, and cannot be sued on by the governor's successor: *Tucker v. Hart*, 23 Miss. 548. Obviously, if a bond is improperly made payable to an officer who is considered incompetent in his official capacity to sue thereon, his successor can have, in his official character, no greater authority: *Anderson v. Brumby* (Ga.), 42 S. E. 77. See, in this connection, "Common-law and Voluntary Obligations—Parties in Actions on," post, p. 202.

j. Imposing Conditions Different from Those Required by Statute.

1. **In General.**—Though the condition of an official bond is more specific than the statute requires, if it superadds no obligation not imposed by the statutory condition, it is good: *Boring v. Williams*, 17 Ala. 510. And it is no objection to a bond that it is broader in its terms than the statute requires, so long as no additional obligation is incurred: *Board of Supervisors v. Pindar*, 3 Lans. (N. Y.) 8. A bond containing all the conditions required by statute, and also conditions in excess of those specified in the statute, is valid so far as it imposes obligations authorized by law. The stipulations in excess may be rejected as surplusage: *Berrien County Treas. v. Bunbury*, 45 Mich. 79, 7 N. W. 704; *Lowe v. Guthrie*, 4 Okla. 287, 44 Pac. 198; *State v. Findley*, 10 Ohio, 51; *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566. On the other hand, the condition may not be so extensive as the statute authorizes, yet so far as an obligation is created it is good: *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11, 30 Am. Dec. 391.

In case the statute is defective in not naming the amount of the penalty in the bond of a public officer, the bond is binding when the amount fixed therein is not unreasonable: *Williams v. Golden*, 10 Neb. 432, 6 N. W. 766. And a misrecital in a collector's bond of the amount to be collected does not relieve the sureties: *Grant Co. Justices v. Bartlett*, 5 B. Mon. (Ky.) 195.

2. **Excessive Penalties.**—An official bond with a penalty in excess of that prescribed by statute is not for that reason invalid: In re *Read*, 34 Ark. 239; *Matthews v. Lee*, 25 Miss. 417; *State v. Rhoades*, 6 Nev. 352; *Governor v. Matlock*, 9 N. C. 366; *Treasurer v. Stevens*, 2 McCord (S. C.), 107; *United States v. Morgan*, 3 Wash. C. C. 10, Fed. Cas. No. 15,809. It has been held, however, that the sureties are bound for no greater sum than the statute requires: *Graham v. State*, 66 Ind. 386; *McCaraher v. Commonwealth*, 5 Watts & S. (Pa.) 21, 39 Am. Dec. 106. But the bond may be enforced for the full amount, where the statute declares that no official bond shall be void for want of compliance with the statute, but shall be valid for the matters therein contained: *State v. Taylor*, 10 S. Dak. 182, 66 Am. St. Rep. 707, 72 N. W. 407.

3. **Less Onerous Conditions.**—If an official bond, instead of containing all the conditions which it should, is less onerous, this is no defense to a breach of those conditions to which the sureties are parties. The fact that the conditions are less onerous than the statute prescribes does not exempt the obligors: *Cooper v. People*, 28 Colo. 67, 63 Pac. 314; *People v. Slocum*, 1 Idaho, 62.

k. **Undertaking Void in Part.**—A bond given for the faithful performance of official duties may be void in part and valid as to the residue. If it contains valid and invalid parts, or legal and illegal conditions, which are separable, the bond may be enforced so far

as good, unless the statute makes it wholly void: *Justices v. Wynn*, Dud. (Ga.) 22; *State v. McGuire*, 46 W. Va. 328, 76 Am. St. Rep. 822, 33 S. E. 313; *United States v. Hodson*, 10 Wall. 395; *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. Rep. 682.

L. Common-law and Voluntary Obligations.

1. **Defective Statutory Bonds.**—The rule is well settled that a bond given for the faithful performance of official duties, or in pursuance of some requirement of law, may be valid and binding upon the parties as a voluntary or common-law obligation, when not made with the formalities or executed in the mode provided by the statute under which it purports to have been given, and hence is not enforceable as a statutory bond, provided it is not in violation of law. This rule rests on the principle that, notwithstanding the instrument may not conform with the special requirements of a statute or regulation in compliance with which the parties executed it, nevertheless it is a contract voluntarily entered into upon a sufficient consideration, for a purpose not contrary to law, and therefore is obligatory on the parties to it in like manner as any other contract or agreement at the common law; and on the further principle that the sureties, having by their act in executing the instrument enabled their principal to obtain the office, are estopped to deny their liability for his official acts: *Wilson v. Cantrell*, 19 Ala. 642; *Carter v. Fidelity etc. Co. (Ala.)*, 32 South. 632; *Pritchett v. People*, 6 Ill. 525; *Todd v. Cowell*, 14 Ill. 72; *Coons v. People*, 76 Ill. 383; *Scarborough v. Parker*, 53 Me. 252; *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261, 22 Atl. 8; *Bank of Brighton v. Smith*, 5 Allen, 413; *State v. O'Gorman*, 75 Mo. 370; *State v. McAlpin*, 26 N. C. 140; *State v. Perkins*, 32 N. C. 333; *Lowe v. Guthrie*, 4 Okla. 287, 44 Pac. 198; *Goodrum v. Carroll*, 2 Humph. (Tenn.) 490, 37 Am. Dec. 564; *Weston v. Sprague*, 54 Vt. 395; *United States v. Linn*, 15 Pet. 290. If a successful contestant of a municipal election files a bond to the city to refund his salary if, on appeal, he is declared not entitled to the office, he and his bondsmen are liable thereon, though there is no statute authorizing it: *Finley v. Tucson (Ariz.)*, 60 Pac. 872.

2. Bonds not Required by Statute.

A. **Binding Effect on Sureties.**—While, as the above cases indicate, the authorities are uniform in holding that a bond, executed because required by statute, but which fails to comply with the statutory requirements, may be valid as a common-law obligation, there is not a harmony of judicial opinion as to the validity and effect of an official bond executed when the statutes require none. Such an instrument, it has been held, is not an official bond, and is void for want of consideration: *Sullivan v. People (Colo. App.)*, 64 Pac. 1049; *State v. Heisey*, 56 Iowa, 404, 9 N. W. 327; *State v. Bartlett*, 30 Miss. 624. The better rule seems to be, however, that a bond, though

not exactible by statute, but given without compulsion, is valid as a common-law obligation: *Board of Supervisors v. Coffenburg*, 1 Mich. 354; *State v. Harney*, 57 Miss. 863; *State v. Sooy*, 38 N. J. L. 324; *Commonwealth v. Wolbert*, 6 Binn. (Pa.) 292, 6 Am. Dec. 452. This principle has found frequent recognition in the federal courts, where it has been held that the United States may take an official bond, if not prohibited by statute nor involuntarily given, although the taking of such bonds may not have been prescribed by any pre-existing legislation: *United States v. Bradley*, 10 Pet. 343; *Jessup v. United States*, 106 U. S. 147; *United States v. Rogers*, 28 Fed. 607; *Rogers v. United States*, 32 Fed. 890. "The consideration or the condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery": *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. Rep. 682.

B. Must be Voluntarily Given.—The bond must, however, be voluntarily given. If extorted from an unwilling officer, it can have no force and effect: See *Board of Commissioners v. Harvey*, 6 Okla. 629, 52 Pac. 402; *United States v. Humason*, 6 Saw. 199, Fed. Cas. No. 15,421. "We hold that a voluntary bond," said Mr. Justice Story, in *United States v. Tingey*, 5 Pet. 115, "taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursement of public moneys, is a binding contract between him and his sureties and the United States, although such bond may not be prescribed or required by any positive law." The particular bond in that case was held void as being extorted under color of office, because it was in plain violation of the statute in regard to giving such bond, and it was demanded of the party upon the peril of losing his office. The court said that, under such circumstances, the bond was an illegal instrument, "for no officer of the government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law."

"We do not understand," observes Mr. Justice Peckham, in *Moses v. United States*, 166 U. S. 571, 17 Sup. Ct. Rep. 682, a case in which a bond was exacted of an officer in the signal service when specially required by no statute, "by the decision in the *Peters* case, above cited, that the meaning of the term 'voluntary bond' is that the bond must have been offered and pressed upon the government when never asked for or demanded by it. It is a voluntary bond when it is not demanded by any particular statute or regulation based thereon, and when it is not exacted in violation of any law or valid regulation of a department. Having a right to take a bond,

the government, in a case like this, has the right to demand it from the officer, and to say to him that if he do not give it he will not be continued as a 'property and disbursing officer of the signal service.' Such a demand, when complied with, does not amount to the illegal exaction or extortion of the bond. The case of a bond so procured differs radically from a case like that of Tingey (*supra*), inasmuch as the bond in the latter case was extorted from a reluctant officer with a condition therein contained different from that which the statute called for." The element of illegality in the demand, which is essential when extortion or duress is urged, is the distinguishing feature of these classes of cases: See *State v. Sooy*, 38 N. J. L. 324.

3. Parties in Actions on.—The rule seems to be uniformly observed that an action on an undertaking, defective as a statutory bond but good as a common-law obligation, can be maintained only in the name of the obligee or his personal representative: *Wilson v. Cantrell*, 19 Ala. 642; cases cited under "Naming Wrong Obligee—Actions to Enforce," *ante*, pp. 197, 198. A suit in the name of the successor of the obligee cannot be maintained. "A successor cannot sue in a mere common-law action upon a voluntary bond, which is not statutory and official. He can sue only upon an official or statutory bond. It is only by virtue of the statute that a successor can sue. By the common law, the obligee or his personal representative alone can sue": *Jones v. Wiley*, 4 Humph. (Tenn.) 146. Commenting on the above rule, Judge Christiancy observes: "Such seems to be the general current of authority—a doctrine, however, when applied to cases where the bond is valid, and was evidently intended by the parties for the same purpose as that required by the statute, which savors more of technicality than of justice or common sense": *People v. Johe*, 22 Mich. 460, 464.

IV. Alterations and Forgeries.

a. Alterations in General.—A surety on the bond of a public officer is entitled to stand on the very terms of his undertaking. Any variation in the contract to which he subscribes which may prejudice him, or may amount to the substitution of a new agreement for the one subscribed will discharge him, unless he consents to the alteration before made or ratifies it subsequently: *Board of Commissioners v. Greenleaf*, 80 Minn. 242, 83 N. W. 157; *State v. Allen*, 69 Miss. 508, 30 Am. St. Rep. 563, 10 South. 473; *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 13 S. W. 758; *Blanton v. Commonwealth*, 91 Va. 1, 20 S. E. 884; *Miller v. Stewart*, 9 Wheat. 680; *Smith v. United States*, 2 Wall. 219.

The erasure of a surety's name, or the substitution of one surety for another, is a material alteration, releasing the obligors: *State v. Churchill*, 48 Ark. 440, 3 S. W. 352, 880; *State v. Craig*, 58 Iowa, 238, 12 N. W. 301; *Bracken County Commrs. v. Daum*, 80 Ky. 388;

State v. McGonigle, 101 Mo. 353, 20 Am. St. Rep. 609, 13 S. W. 758; *State v. Findley*, 101 Mo. 368, 14 S. W. 111. And the addition of further sureties upon a bond after its approval or delivery releases the original sureties from liability for a subsequent default, but binds the additional sureties to answer therefor: *Stoner v. Keith County*, 48 Neb. 279, 67 N. W. 311; *State v. Paxton (Neb.)*, 90 N. W. 983. But the erasure of a surety's name and the substitution of another before delivery will not avoid it, if it is otherwise regular on its face, and the alteration has been so carefully done that it cannot be detected without a close examination: *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, 32 Pac. 538. An immaterial alteration—an alteration not changing the duties, rights, or obligations of the parties, will not discharge the obligors: *Crawford v. Dexter*, 5 Saw. 201, Fed. Cas. No. 3368. A change in the date of a bond so as to correspond with the date of acceptance does not invalidate it: *State v. Dunn*, 11 La. Ann. 549. And where the principal cuts off the names of the sureties and attaches them to an exact copy of the bond, made because the original bond was mutilated, they are bound: *State v. Harney*, 57 Miss. 863. It has been adjudged, however, that reducing the amount to be collected, in a collector's bond, releases the obligors: *Doane v. Eldridge*, 16 Gray, 254. And the addition of seals has been held to vitiate a bond: *State v. Smith*, 9 Houst. (Del.) 143, 31 Atl. 516; *Barnet v. Abbott*, 53 Vt. 120. It is doubtful, indeed, if such an alteration would be considered material in jurisdictions where seals are justly regarded with little reverence.

The alteration of an official bond may be ratified by the sureties so as to be binding upon them: *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; *State v. Paxton (Neb.)*, 90 N. W. 983.

b. Filling of Blanks.—One who, as surety, signs and delivers to the principal an official bond with blanks as to the name and term of office, the penal sum, date, names of other sureties, and the like, impliedly consents that such blanks may be filled subsequently. He is bound, though his principal inserts a penalty greater than that limited by their mutual agreement, or obtains worthless sureties instead of those agreed upon: *State v. Pepper*, 31 Ind. 76; *Rose v. Douglas County*, 52 Kan. 451, 39 Am. St. Rep. 354, 34 Pac. 1046; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *Smith v. Crooker*, 5 Mass. 538; *Butler v. United States*, 21 Wall. 272. Compare *Wynne v. Governor*, 1 Yerg. (Tenn.) 149, 24 Am. Dec. 448. And the obligee's knowledge that the bond was thus delivered does not prevent his recovery on it: *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182. Authority to fill a blank in a sealed instrument may be shown by parol, and such authority may be express or implied from circumstances: *State v. Young*, 23 Minn. 551. Compare *State v. Boring*, 15 Ohio, 507.

c. Spoliation or Alteration.—The distinction between the alteration and spoliation of an instrument is, that the first is applied ordinarily to the act of a party under the instrument, and imputes some fraud or design on his part to change its effect; the other refers to the unauthorized act of a stranger, and does not change the legal operation of the writing so long as the original remains legible: *Medlin v. Platt County*, 8 Mo. 235, 40 Am. Dec. 135. The spoliation of an official bond can occur only when it is the act of a stranger, without participation of the parties interested; and while county officials having the custody of such bonds are strangers, within this rule, so that the defacement of such bonds by them is but an act of spoliation, still, if the bonds are altered by them before they are delivered or accepted, the doctrine of spoliation does not apply: *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609, 13 S. W. 758. That the substitution by approving officers of one surety for another releases the sureties, see *Bracken County Commrs. v. Daum*, 80 Ky. 388.

d. Forgeries.—In *Seeley v. People*, 27 Ill. 173, 81 Am. Dec. 224, it was held that a surety on the bond of a public officer is not liable if the name of a surety upon the undertaking before him was forged. This case was followed in *Cornell v. People*, 37 Ill. App. 490, and *Chamberlin v. Brewer*, 3 Bush (Ky.), 561, holding that a surety who signs on a false representation that a prior signature is genuine is not bound. The *Seeley* case was overruled, however, in *Stern v. People*, 102 Ill. 540, where it was held that the fact that the name of one surety has been forged does not discharge a surety who subsequently executes the bond in ignorance of the forgery: To the same effect, see *Mathis v. Morgan*, 72 Ga. 517, 53 Am. Rep. 847; *State v. Pepper*, 31 Ind. 76; *State v. Baker*, 64 Mo. 167, 27 Am. Rep. 214. But where a surety signed a bond on the condition that a certain other person should also be procured as surety, and such person's signature was not obtained, but his name was forged to the instrument, the bond was held void as to the surety signing it conditionally: *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389.

V. Eligibility and Title of Principal to Office.

a. Effect of Ineligibility.—When a public officer has entered upon the duties of his office, exercised the functions pertaining thereto, and received the emoluments thereof, the sureties cannot urge as a defense to their liability on his bond that he was not eligible to the office: *Commonwealth ex rel. Harris v. Teal*, 14 B. Mon. (Ky.) 29; *Jones v. Gallatin County*, 78 Ky. 491; *Board of School Directors v. Judice*, 39 La. Ann. 896, 2 South. 792. The sureties of a school treasurer are estopped to allege that he was, because a defaulter, ineligible at the time of his election: *Hogue v. State* (Ind.), 62 N. E. 656. And the sureties on the bond of a city marshal are not released by the fact that he had not settled with the city for col-

lections made during the preceding term, as required by the charter, because of which delinquency he was rendered ineligible to the office: *Wade v. Mt. Sterling*, 18 Ky. Law. Rep. 377, 33 S. W. 1113.

b. Omission to Take Oath or Sue Out Commission.—It is no part of the contract of sureties that, before their liability shall attach, their principal shall comply strictly with all the requirements of the law, so as to constitute himself, before entering upon the duties of his office, an officer *de jure* in all respects and in every particular: *State v. Toomer*, 7 Rich. (S. C.) 216. His omission to take the oath of office does not release them: *Davis v. Haydon*, 4 Ill. 35; *Board of School Directors v. Judice*, 39 La. Ann. 896, 2 South. 792; *Marshall v. Hamilton*, 41 Miss. 229; *State v. Findley*, 10 Ohio, 51; *Lyndon v. Miller*, 36 Vt. 329; *State v. Bates*, 36 Vt. 387. Neither does his failure to sue out his commission within the time prescribed by statute: *State v. Toomer*, 7 Rich. (S. C.) 216.

c. Invalidity of Title—De Facto Officer.—The sureties on the bond of a public officer cannot dispute their principal's title to office when they are held to answer for his acts. If he is a *de facto* officer, they are answerable for his faults. They cannot deny the validity of his appointment or election: *Sprowl v. Lawrence*, 33 Ala. 674; *Williamson v. Woolf*, 37 Ala. 298; *Norris v. State*, 22 Ark. 524; *People v. Jenkins*, 17 Cal. 500; *Boone County v. Jones*, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155; *Mayor of Homer v. Merritt*, 27 La. Ann. 568; *Wendell v. Fleming*, 8 Gray, 613; *State v. Rhoades*, 6 Nev. 352; *Custer County v. Albien*, 7 S. Dak. 482, 64 N. W. 533; *Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300.

The public is not bound to inquire into all the technical questions which may affect the right of the officer to the office which he holds. Although he may have been elected by illegal votes, or may have been ineligible to the office, although the great seal of state may not have been impressed upon his commission, although even no commission at all may have been issued to him, or although he may never have taken an official oath, or although he may have been elected to the legislature, which is an office incompatible with that of justice of the peace [the bond here involved was that of a justice], still, so long as he continued to discharge the duties of a justice of the peace, and held himself out to the world as such, his official acts were binding, not only upon suitors, but also upon his sureties, and they continued bound upon their obligation. By signing his bond they acknowledged his right to the office, and to discharge its duties, and as such recommended him to the public. They, at least, shall not be heard to say, that although they signed his bond and thereby induced others to put money in his hands, relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; that he was not, in fact, a justice.

VI. Negligence and Wrong of Other Officers.

a. No Defense to Sureties.—It is no defense to the liability of the sureties of a public officer that the fraud, wrong, or laches of other officers was an inducement to their undertaking. There is a distinction between acts done by a public officer and acts done by a private individual whereby one is induced to become a surety, the government not being responsible for the laches or wrongful acts of its officers: *Estate of Ramsay v. People* (the principal case), ante, p. 117; *Hogue v. State* (Ind.), 62 N. E. 656; *Bonta v. Mercer County Court*, 7 Bush (Ky.), 576; *Detroit v. Weber*, 26 Mich. 284; *State v. Bates*, 36 Vt. 387. They are not exonerated from liability, because the county commissioners caused an erroneous newspaper publication of the accounts of their principal for a preceding year: *Bower v. Washington Co. Commrs.*, 25 Pa. St. 69; or because commissioners, at the time of appointing him to office, knew that he was a defaulter and did not communicate this information: *Frownfelter v. State*, 66 Md. 80, 5 Atl. 410; or because the officers, whose duty it was to approve and accept the bond of their principal, knew he was chargeable with conversion during the prior term: *County of Pine v. Willard*, 39 Minn. 125, 12 Am. St. Rep. 622, 39 N. W. 71; or, knowing him to be in default, represented that he was not: *Halletsville v. Long* (Tex. Civ. App.), 32 S. W. 567.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

ARMSTRONG v. BROWN. WRIGHT v. CLARK.

[106 Ky. 81, 50 S. W. 17.]

MUNICIPAL CORPORATIONS—Impounding Ordinances.—An ordinance providing for the impounding of livestock found running at large and for its sale upon actual or constructive notice to the owner is a valid exercise of the police power conferred upon a municipality by a statute authorizing it to "make proper regulations for the impounding of stock, release of the same," etc. (pp. 209, 210.)

MUNICIPAL CORPORATIONS—Impounding Ordinances—Due Process of Law.—A municipal ordinance authorizing a sale of property impounded after a judicial determination that the ordinance has been violated in permitting the property impounded to be at large, is valid. (p. 210.)

MUNICIPAL CORPORATIONS—Impounding Ordinances—Due Process of Law.—An ordinance providing that notice shall be posted at the courthouse door for five days to the unknown owners of impounding animals, after which, on failure of such owner to appear, the police court may declare a forfeiture and render a judgment of sale, to be followed by five days' advertisement of such sale, describing the animals, prescribes a due process of law and renders a sale under such proceedings valid. (pp. 208, 211.)

S. A. Russell, for the appellant.

H. W. Rives and J. McChord, for the appellees.

83 WHITE, J. These two cases involve the same question, and are identical save parties, and will be determined together. The appellants brought these actions in replevin for the delivery of certain livestock, horse and mule against appellees, the board of council of the city of Lebanon, the chief of police and the purchaser of the stock. The answer pleads, by way of defense, that the property sued for was, under an ordinance duly and regularly passed by the city of Lebanon, taken charge of by the chief of police and impounded, and after notice as pro-

vided by the ordinance had been given, the said property was, by the judgment of the city court, declared to be forfeited and ordered sold; that after due notice of the time and place of sale, as required by the ordinance, the property was sold at public outcry to the highest bidder and that one of appellees became the purchaser of the property, and that this was the wrongful seizure and possession complained of. The ordinances were set out in full and a certified copy filed with the answer. To this answer a demurrer was overruled in each case, and, appellants declining to plead further, the petition was dismissed absolutely. From that judgment these appeals are prosecuted.

The sole question presented by these appeals is the validity of the ordinance of the city of Lebanon, approved April 12, 1894, entitled "An ordinance to prevent the running at large of livestock in the city of Lebanon, to provide for a pound, a poundmaster, and for other purposes." This ordinance provides in sections 1 to 4 that it shall be unlawful for certain kinds of stock, including the kinds here sued for, to roam or be at large within the corporate limits; and that it shall be the duty ⁸⁴ of a policeman to seize any such stock found on the street; and permitting any citizen upon whose premises the stock may go, to seize the stock, in either case to be delivered to the poundkeeper; and making it the duty of the person taking up such property to report in writing such fact within twenty-four hours to the police judge of the city of Lebanon, together with the description of the stock and the name of the owner, if known, and, if the owner be unknown, shall so state. This report shall be sworn to.

Section 5 provides for summons issued against the owner, returnable not less than three days from the issual, to show cause why the stock shall not be sold, etc.

Section 6 provides: "When the name of the owner of any stock taken up is not known, no summons shall be issued, but it shall be the duty of the police judge to post at the courthouse door in the city of Lebanon and at the city pound a written or printed notice, describing the stock taken up, and when and by whom, and the amount of damages claimed, if any, and requiring the owner to appear before the Lebanon police court, at a time specified in the notice, not less than five days from the posting of the notice, to show cause, if any he can, why the stock shall not be sold as provided by this ordinance."

Section 8 provides: "If the owner of any stock taken up under the provisions of this ordinance, after being notified as

provided in section 5 or section 6, shall fail to appear and defend, or if his defense be adjudged insufficient, the court shall enter judgment directing the chief of police to sell the stock for the payment of fees, costs, and damages assessed against it, and the sale shall be made and reported to the next term of the court ⁸⁵ thereafter. Every sale made under this ordinance shall be between the hours of 10 o'clock A. M. and 2 o'clock P. M., in front of the courthouse door in the city of Lebanon, on a credit of thirty days, with approved security, and after notice of the time, place, and terms of this sale shall have been posted at the courthouse door and at the city pound for five days prior thereto."

The remaining sections provide that the excess of the proceeds of sale over the fees, etc., shall be retained in the city treasury for the benefit of the owner, and paid upon his demand or order, and for the election of a poundmaster, and the fees and costs incident to the impounding, trial, and sale, and redemption before sale.

The answer specifically alleges a compliance with each provision of the ordinance, the owner of the property being unknown, and not appearing either at the time fixed in the notice for trial or with an offer of redemption. Each step taken is set out in the answer, from the taking up to the sale and payment of the purchase price.

Lebanon is a city of the fourth class, and its charter is found in Kentucky Statutes, sections 3481-3606, both inclusive. Subsection 31 of section 3490 ("Powers of the General Council") provides: "The board of council shall have the right to establish and maintain a pound and make proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large of stock on the streets of the city."

It is clear that the ordinance passed was in pursuance of the authority, or supposed authority, of this charter provision.

It is insisted, however, for appellants that, under this provision of the charter, the council had no power to authorize ⁸⁶ a sale or forfeiture of the property impounded, but that it could only fix a penalty against the owner, if in fault, and to fix certain fees and charges as a lien on the property, and to retain the property till the lien be satisfied. It is contended that the language "and proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large," etc., is exclusive of all other power, and that, as the power of sale is not

mentioned, it is not given. We are of opinion, on the authority of the cases of *McKee v. McKee*, 8 B. Mon. 433, and *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208, that the city counsel of Lebanon had full authority to pass the ordinance in question, in so far as it authorizes a sale of the property impounded after a judicial determination by some court that the ordinance has been violated in permitting the stock to be at large. The charter provisions in those cases were not as strong or as clear as in these, yet they were upheld in so far as it provided for a forfeiture and sale.

It is insisted that if the charter authorizes a forfeiture and sale after judicial determination of a violation, still the sale and proceedings herein are void, because the notice required, and the only one alleged to have been given—a posted written notice, describing the property, at the courthouse door and at the city pound for five days before the day of trial—is unreasonable, being too short, and as it is not alleged that appellants, the owners, had actual notice of the trial or proceedings; that, therefore, there was no notice, and appellants are bound by the trial and judgment of the police court on such notice; and that to thus deprive these appellants of their property is a violation of the constitutional guaranty of the rights of ⁸⁷ property, and that they shall not be deprived thereof without due process of law; that it is merely a confiscation, under pretense of the forms of law, of which appellants had neither actual nor reasonable constructive notice. The validity of ordinances of this character has repeatedly been before the courts, and the reports of the various states contain many adjudged cases bearing on this question.

Some courts have held that the power to pass ordinances providing for summary process and sale was legal, and not unconstitutional, as they were within the exercise of the police power, and were of the character of laws that permits the destruction of a building to prevent the spread of fire, or the summary killing of domestic animals to prevent the spread of disease. The other courts hold that the better rule is that, before a forfeiture and sale, there must be some judicial proceeding. With the latter class our courts seem to have agreed, and we think properly so. It is clear that the impounding must be summary, but that there should be some judicial determination of a violation of the ordinance we entertain no doubt.

The serious question arises, Is five days sufficient time for constructive notice, with another five days before sale in which

the owner may redeem? The proceeding to forfeit and order a sale is in rem, and can only affect the property impounded. Without a regular service of process and trial, the owner could not be fined, or adjudged to be indebted, exceeding the value of the animal impounded. This being true, the fees and costs of keeping the stock must be paid out of the proceeds of sale, and to require longer notice before trial would add more costs for the keeping of the animal, to be paid by the owner, or retained from the proceeds of the sale. If the unknown ⁸⁸ owner was treated as a nonresident, and a warning order made for sixty or ninety days, the costs of keeping would often equal, if not exceed, the value of the property. So, from the very nature of the case, it is necessary, in the interest of the owner and the city, that the property should be sold as early as may be done, giving a reasonable opportunity to the owner to be heard, or, as commonly said, "to have his day in court."

We are of opinion that public posted notice for five days, as required by the ordinance, was reasonable and sufficient to sustain jurisdiction of the police court to declare a forfeiture and render judgment of sale. The reasonable presumption is that personal property, when sold at public outcry, after notice publicly given as provided, will bring its fair market value. After the legal charges and fees are deducted, the owner, by applying to the city treasurer, is entitled to the balance of the proceeds of the sale.

The proceedings had in these cases appear to have been regular, and the ordinance was strictly followed. In our opinion, the answers presented a complete defense, and the demurrers thereto were properly overruled.

Judgment affirmed in each case.

SUMMARY PROCEEDINGS TO IMPOUND AND SELL ANIMALS.*

- I. Distraining Animals Damage Feasant.**
 - a. The Right to Distrain.
 - b. Sale of Impounded Animals—Due Process of Law.
- II. Destruction of Dogs.**
 - a. Extent of the Power of—Due Process of Law.
- III. Disposition of Animals at Large in Public Places.**
 - a. Power of Municipalities Respecting.
 - b. Law Must be Strictly Followed.

^{*}REFERENCES TO MONOGRAPHIC NOTES.

Estray laws: 8 Am. St. Rep. 271-273.

Liability for trespasses of animals generally: 49 Am. Dec. 248-273.

Liability of owner of stock ranging on the lands of another unprotected by a fence: 81 Am. St. Rep. 446-453.

- c. Due Process of Law.
- d. Notice of Sale.
 - 1. Necessity and Sufficiency.
 - 2. The Time Prescribed.
- e. Status of Nonresident Owners.

I. Distraining Animals Damage Feasant.

a. **The Right to Distrain.**—In this note, we shall be concerned primarily with the seizure and disposition of animals running at large in streets, highways, and other public places in such a manner as to be an offense or nuisance to the public in general, and we shall notice only incidentally the taking up and holding of animals by a private individual for injuries sustained from their trespass upon his lands. The right of distress damage feasant existed at the common law. Its exercise has, however, been quite generally regulated by statute. It sprang from a necessity for a summary and direct remedy against the owner of animals committing damage. He might be irresponsible or unknown or out of the way of being reached by process. In short, the injured party might, by reason of various impediments, be unable to obtain redress by an ordinary action. Besides, the protection of the beasts was involved. If the injured party could not hold them, he might be moved to misuse them or put them in a way to be lost to the owner: *Hamlin v. Mack*, 33 Mich. 103.

Under the rule of distraining beasts damage feasant is comprehended the right of the owner of lands to seize and impound the animals of another trespassing on his premises, and to hold them until compensation for the damages sustained is made. The impounding may be made regardless of the manner in which they may have left the inclosure or keeping of their owner, but it cannot be resorted to unless actual damages are inflicted. The mere trespass of the animals will not justify their seizure and detention. Moreover, the strict construction put upon this right of distress requires that the taking must be before the trespassing animals leave the premises, and that the damages must be restricted to those sustained on that particular occasion: *McConnell v. Cate*, 70 N. H. 296, 47 Atl. 266; *Leavitt v. Thompson*, 56 Barb. 542, 551; *Gilbert v. Stephens*, 6 Okla. 673, 55 Pac. 1070; *Holden v. Torrey*, 31 Vt. 690. When, however, at the precise time of the taking, they are trespassing upon another part of the premises than where first found, they may be impounded: *McKeen v. Converse*, 68 N. H. 173, 39 Atl. 435. The owner of the fee of land adjoining a highway cannot take up and hold animals depasturing the herbage therein: *Bertwhistle v. Goodrich*, 53 Mich. 457, 19 N. W. 143; *Taylor v. Wellby*, 36 Wis. 42.

b. **Sale of Impounded Animals—Due Process of Law.**—The common law, as we understand it, gave the distrainer of animals damage feasant no right of confiscation, but authorized him only to

impound and hold them until compensated for the damage sustained. Statutes have been enacted, however, which authorize the sale of animals trespassing upon private grounds, from the proceeds of which the land owner may be remunerated for losses occasioned by the trespass and the taking and keeping of the beasts. If the proceedings for the sale, as prescribed by the statute, do not constitute due process of law, the statute is, of course, unconstitutional and void. A Texas statute provided that the owner of premises might take up and impound trespassing animals until his fees and damages were paid; that the owner should at once be notified, and should have the right to regain possession upon payment of fees and damages; that the amount of damages should be assessed by three disinterested freeholders, whose judgment should be final; and that the impounder might sell the animals at public auction, upon giving notice as required for a constable's sale of personal property, and apply the proceeds to the payment of his damages and fees, paying the surplus, if any, to the owner. This statute was declared unconstitutional in *Armstrong v. Traylor*, 87 Tex. 598, 30 S. W. 440. Mr. Justice Brown, in delivering the opinion of the court, said:

“The law in question does not have in view the protection of the public against the inconvenience of having the free use of the highway impeded by the running of the stock therein, but protects the private citizen in the enjoyment of his private property, and provides for compensating him for injury to such private property. The questions involved are, Has there been an infraction of the rights of the citizen, not the public, and what injury has he sustained? These are strictly private rights arising between individuals, in which the public has no more concern than in any other private wrong. No public officer has authority to impound the stock for the public protection; no public pound is required; the fees do not go to a public officer in support of the enforcement of the law. The private citizen whose rights have been invaded can alone act in the premises; the fees are given to him to remunerate him for acting in his own interest, and he takes the property into his own custody, without bond or any security to the owner. No penalty is given for a wrong to the public, but compensation for the private injury done to the property of the man who is authorized to seize the stock, and for expenses incurred by him in so doing without the consent of the owner.

“The interested party is authorized to determine the question of a trespass having been committed by the stock; it is not provided that this question shall be inquired into by any other person or officer; its seizure is its condemnation, leaving nothing to be ascertained but the amount of damages. The same person must select the freeholders to assess the damages which he is to receive; the law makes him the sole actor in the matter. When thus selected, the freehold-

ers are not required to hear evidence as to the trespass or the amount of the damages; in fact, they have no power to decide whether or not the trespass has been committed, but are confined to the amount of compensation. The owner has no voice in the selection of the freeholders, nor has he the right to appear before them in person or by attorney; he has no right of appeal, in fact no right except to pay the costs incurred and the damages assessed, or give up his stock. There is no hearing, no inquiry, and no trial before judgment; no officer to sell the property, nor process under which sale is to be made; nothing that bears the faintest resemblance to a judicial proceeding. Such a law affords no security to the owner of the stock; it is not due process of law, and the property is not sold 'by the due course of the law of the land': See, also, *Bullock v. Geomble*, 45 Ill. 218; *Pettit v. May*, 34 Wis. 666.

A New York statute, providing for the summary seizure and sale of animals trespassing on private grounds, as well as those running at large in public places was, so far as it authorized the sale of beasts taken damage feasant, pronounced unconstitutional as inflicting a penalty for a private wrong and depriving of property without due process of law: See *Rockwell v. Nearing*, 35 N. Y. 302, reversing *Hard v. Nearing*, 44 Barb. 472. Subsequently, this act was so amended as to provide a regular and orderly judicial proceeding before a justice of the peace, and a judgment in virtue of which the property was to be sold as at a constable's sale, the proceeds to be applied to the payment of the damages and expenses and the surplus to go to the owner. The phase of the amended act having to do with the sale of animals running at large was upheld as constitutional in *Campbell v. Evans*, 45 N. Y. 356. And when that portion of the statute authorizing the sale of animals doing a private injury was under consideration in *Cook v. Gregg*, 46 N. Y. 439, it was said, in sustaining the validity of the statute, that "whether the seizure is for an offense against the public, as for running at large in the highway, or a private wrong, as for a trespass upon lands, is immaterial. The same procedure is given for the trial of the question involved; and the condemnation of the cattle seized in both cases; and in both, if in either, is 'due process of law,' within the terms, by the constitution." Prior to, or contemporaneous with, this decision in the court of appeals this portion of the statute had been pronounced constitutional in *Fox v. Dunckle*, 38 How. Pr. 136; *Squares v. Campbell*, 41 How. Pr. 193; but it had been declared unconstitutional in *Campbell v. Evans*, 54 Barb. 566; *McConnell v. Van Aerman*, 56 Barb. 534; *Leavitt v. Thompson*, 56 Barb. 542.

II. Destruction of Dogs.

a. **Extent of the Power of—Due Process of Law.**—The power of commonwealths and municipalities to regulate the keeping of dogs

as a police measure is undoubted. The extent to which such regulation may be carried is not so clear. The course legislation has taken on this subject is to require the payment of a tax or license fee on the dog or to compel his being registered or muzzled or require his wearing a prescribed collar or badge, the penalty for noncompliance with the statute or ordinance being the summary destruction of the animal. These regulations are all more or less severe, some are exceedingly so in authorizing the killing of the offending animal forthwith without notice to the owner or a hearing in the execution of the law: See *Gibson v. Town of Harrison*, 69 Ark. 385, 63 S. W. 999; *Ford v. Glennon* (Conn.), 49 Atl. 189; *Leach v. Elwood*, 3 Ill. App. 453; *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20; *Nehr v. State*, 35 Neb. 638, 53 N. W. 589; monographic note to *Hamby v. Sampson*, 67 Am. St. Rep. 298.

Such extreme measures are based largely on the vicious propensities attributed to dogs, and on the ancient but mistaken idea that a dog is not property, or at most is only a base form of property. So far as a dog is a nuisance or a menace to society he may be summarily killed at the common law, and, for this matter, any other domestic animal may be. No police ordinance or statute is necessary to authorize such destruction. That old absurdity so often mentioned that at the common law it was not larceny to steal a dog, since he was not property, though it was larceny to steal a dead dog's hide, should, at this day, be forgotten, so far as it is supposed to state a principle of law. The world moves, and whatever may have been the supposed status of dogs in times gone by they are now regarded, and rightly so, as property. And we know of no degrees or gradations of property. A thing is property or it is not property. If it is property, the owner cannot be deprived of it without due process of law.

A dog is property in the fullest sense of the term. "The craven who would wantonly injure him is the subject of a fine; the thief who would steal him may be declared a felon, and rendered infamous in the eyes of the law and his fellow citizens; human life may be taken, justifiably, in the defense of his possession; and he is made the subject of the taxable burdens of the government." More than this, he ranks among the noblest representatives of the animal kingdom, and is justly esteemed for his intelligence, sagacity, fidelity, and affection. From time out of mind he has been the friend, companion, and solace of man; and the law only recognizes the "testimony of human nature, history, and poetry, in withdrawing him from outlawry."

True, the dog has well-known infirmities which sometimes make him little less than a nuisance. So have other domestic animals, though probably in a less degree. The destruction of any form of property without notice or hearing may, in certain emergencies, be justified. But the exigency must be extreme that authorizes the

deprivation of property without due process of law. And due process of law has the same application to property in dogs that it has to property in other animals. An ordinance or statute authorizing the killing of a dog forthwith or without an opportunity for a hearing on the part of its owner, simply because he is not licensed or registered, or is without a badge or collar, permits the taking of property without due process of law, and can find no justification in law or morals. That they may be impounded, and after a reasonable time destroyed if not redeemed by their owner, after a reasonable opportunity to do so, we have no doubt. There is no public necessity for their destruction in a more summary fashion, and any police measure that countenances it is an intolerable invasion of private rights: See *People v. Tighe*, 9 Misc. Rep. 607, 30 N. Y. Supp. 368; *Archer v. Baertschi*, 8 Ohio C. C. 12; *Hurley v. State*, 30 Tex. App. 333, 28 Am. St. Rep. 916, 17 S. W. 455; *Lynn v. State*, 33 Tex. Cr. Rep. 153, 25 S. W. 779.

III. Disposition of Animals at Large in Public Places.

a. Power of Municipalities Respecting.—The power of towns, boroughs, and municipalities to enact ordinances providing for the taking up and impounding of animals running at large is unquestioned so long as the regulations adopted are reasonable and conducive to the protection of the health, safety, or comfort of the public. This power, in more recent times, at any rate, includes the power to sell the impounded animals, provided the proceedings therefor are in accordance with due process of law: See *Folmar v. Curtis*, 86 Ala. 354, 5 South. 678; *Amyx v. Taber*, 23 Cal. 370; *Whitlock v. West*, 26 Conn. 406; *Roberts v. Ogle*, 30 Ill. 459, 83 Am. Dec. 201; *Swander v. Wakefield*, 84 Ill. App. 426; *Third Mun. etc. New Orleans v. Blane*, 1 La. Ann. 385; *Commonwealth v. Curtis*, 9 Allen, 266; *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183; *Moore v. State*, 11 Lea (Tenn.), 35; *Heath v. Hall* (Tex. Civ. App.), 27 S. W. 160. It is clear that the legislature is competent to adopt such measures or empower towns and cities to do so: *McKee v. McKee*, 8 B. Mon. 433; *Spitler v. Young*, 63 Mo. 42; *Campbell v. Evans*, 54 Barb. 566. Some decisions seem to advance the doctrine that municipalities cannot exercise this power unless expressly conferred by the legislature: *Gosselink v. Campbell*, 4 Iowa, 296; *Johnson v. Daw*, 53 Mo. App. 372; *White v. Tallman*, 26 N. J. L. 67. It is believed, however, that this right is embraced in the power to abate nuisances, and in the "general welfare" and "peace and good government" clauses common to municipal charters: *Mayor v. Lanham*, 67 Ga. 753; *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20; *Cochrane v. Mayor*, 81 Md. 54, 48 Am. St. Rep. 479, 31 Atl. 703; *Commonwealth v. Bean*, 80 Mass. (14 Gray), 52; *Hellen v. Noe*, 25 N. C. 493; *Crosby v. Warren*, 1 Rich. (S. C.) 385; *Kennedy v. Sowden*, 1 McMull. (S. C.) 323; *Wilson v. Beyers*, 5 Wash. 303, 34 Am. St. Rep. 858, 32 Pac. 90.

b. Law Must be Strictly Followed.—Perhaps no principle of law is better settled, or more firmly adhered to, than that in all penal or summary proceedings for the divestiture of title to property, the law must not only be construed strictly, but its substantial requirements must be observed strictly. The law authorizing the summary seizure and sale of animals running at large is within this rule, and must, in all its essential provisions, be strictly pursued, otherwise the whole transaction is void. Whether or not actual injury to the owner results by reason of a departure from the prescribed proceedings is immaterial. The substantial rights of the owner must be accorded him: *City of Fort Smith v. Dodson*, 51 Ark. 447, 14 Am. St. Rep. 62, 11 S. W. 687; *Trumpler v. Bemerly*, 39 Cal. 490; *Chase v. Putman*, 117 Cal. 364, 49 Pac. 204; *Bullock v. Goemle*, 45 Ill. 218; *Nafe v. Leiter*, 103 Ind. 138, 2 N. E. 317; *Frazier v. Goar*, 1 Ind. App. 38, 27 N. E. 442; *Wyman v. Turner*, 14 Ind. App. 118, 42 N. E. 652; *McManaway v. Crispin*, 22 Ind. App. 368, 53 N. E. 840; *Merrill v. Gatchell*, 17 Me. 191; *Palmer v. Spaulding*, 17 Me. 239; *Morse v. Reed*, 28 Me. 481; *Smith v. Gates*, 21 Pick. 55; *Pickard v. Howe*, 12 Met. 198; *Crook v. Peebly*, 8 Mo. 344; *Strauser v. Kosier*, 58 Pa. St. 496; *Fitzwater v. Stout*, 16 Pa. St. 22.

c. Due Process of Law.—It seems to be well established that ordinances and statutes authorizing the taking up, and impounding, of animals at large in public places, and their detention until the payment of a reasonable charge, or their sale by a public officer without a judicial investigation further than to determine whether the law has been violated, upon notice posted or published, do not contravene the constitutional inhibition against the deprivation of property without due process of law: *Dillard v. Webb*, 55 Ala. 468; *Gilchrist v. Schmidling*, 12 Kan. 263; *Armstrong v. Brown* (the principal case), ante, p. 207; *Campau v. Langley*, 39 Mich. 451, 33 Am. Rep. 414; *Campbell v. Evans*, 45 N. Y. 356; *Stewart v. Hunter*, 16 Or. 62, 8 Am. St. Rep. 267, 16 Pac. 876; *Burdett v. Allen*, 35 W. Va. 347, 13 S. E. 1012; *City of Waco v. Powell*, 32 Tex. 258; *Coyle v. McNabb* (Tex.), 18 S. W. 198; *City of Paris v. Hale*, 13 Tex. Civ. App. 386, 35 S. W. 333. "To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the streets, without an adjudication of the offense in the courts, appears to be a harsh remedy. But how this summary mode of proceeding can be avoided, without surrendering the whole police power to protect the public highways from such an encroachment which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed, cared for, and kept until the owner pays the expenses and takes them away. If he fails or refuses to do so, they must be sold": *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435.

In cases where the law provides that the surplus of the proceeds, after deducting the expenses of impounding the animals and conducting the sale, shall be paid over to the owner, it is held that, strictly speaking, a forfeiture of the property is not worked: *City of Fort Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589; *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399; *Grover v. Huckins*, 26 Mich. 476. There is, in effect, only the abatement of a nuisance: *Gosselink v. Campbell*, 4 Iowa, 296. But whatever disposition is made of the proceeds, whether they are paid to the owner or go to the treasury of the municipality, is perhaps immaterial so far as concerns the constitutionality of the law providing for the sale: *Folmar v. Curtis*, 86 Ala. 354, 5 South. 678; *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435. The fact that the animals are exempt from execution is not important: *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435.

While an ordinance or statute authorizing the impounding of animals running at large in streets, highways, and like places, and their sale for the expenses incurred, without judicial proceedings, does not offend the constitution, still, if the law goes further, and imposes a penalty or fine on the owner without a judicial investigation, or an opportunity to show that the penalty has not been incurred, it cannot be upheld: *Popper v. Holmes*, 44 Ill. 360, 92 Am. Dec. 186; *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Wilcox v. Hemming*, 58 Wis. 144, 46 Am. Rep. 625, 15 N. W. 435. And one cannot be adjudged to pay damages for injury done by his cattle, except by the judgment of a regularly constituted court, after having been notified and given an opportunity of trial and defense. An ordinance attempting to authorize it is void. A clause therein for an appraisement of damages by three persons does not provide a judicial determination of the damages: *Bullock v. Geomble*, 45 Ill. 218. In two early South Carolina cases, however, it seems to have been considered that a sale of the animals for a fine or penalty does not deprive the owner of property without due process of law: See *Kennedy v. Sowden*, 1 McMull. 323; *Crosby v. Warren*, 1 Rich. (S. C.) 385.

d. Notice of Sale.

1. **Necessity and Sufficiency.**—The sale of impounded animals by public authority must be preceded by notice. An ordinance providing for a sale without notice is unconstitutional: *Varden v. Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143; *Rosebaugh v. Saffin*, 10 Ohio, 31. Personal notice is not essential. Such notice is not necessarily demanded to constitute due process of law. Besides, the proceedings are in the nature of proceedings in rem. A notice by posting or publication, such as is likely under all the circumstances to reach the interested party, is sufficient: *Fort Smith v. Dodson*, 46 Ark. 296, 55 Am. Rep. 589; *Campbell v. Evans*, 54 Barb. 566-588; *Hogan v. Brown*, 125 N. C. 251,

34 S. E. 411; *Farrar v. Bell*, 73 Vt. 342, 50 Atl. 1107. A strict compliance with the substantial provisions of the statute or ordinance as to the giving of public notice must be observed or the sale will be void: *Hill v. Ginn*, 2 Penne. (Del.) 174, 43 Atl. 608; *Forsyth v. Walch*, 4 Ind. App. 182, 30 N. E. 720; *Sanderson v. Lawrence*, 2 Gray, 178; *Phillips v. Bristol*, 131 Mass. 426; *Jones v. Dashner*, 89 Mich. 246, 50 N. W. 849; *Sweeney v. Sweet*, 14 R. I. 195. A notice that does not show the owner's name, nor that it is unknown, is not sufficient: *Forsyth v. Walch*, 4 Ind. App. 182, 30 N. E. 720. Neither is one that does not state the place of sale: *Sutton v. Beach*, 2 Vt. 42. Nor one served on the owner's agent in his individual capacity: *Wyman v. Turner*, 14 Ind. App. 118, 42 N. E. 652. A substantial compliance with the requirements of notice is sufficient. It need not be framed in the very words and form of the statute: *Cleverly v. Towle*, 3 Allen, 39. Actual knowledge on the part of the owner does not take the place of the written notice required by statute: *Coffin v. Field*, 7 Cush. 355. Though when animals are taken damage feasant, written notice is waived when the owner is placed in possession of the facts before the time for giving the notice has expired: *Parks v. Kersteller*, 113 Mich. 520, 71 N. W. 865. There must be an affirmative showing that notice of the sale was properly given: *Dexter v. Ohlander*, 93 Ala. 440, 9 South. 361. The burden is on a city, when sued by one whose animal has been sold, to show a compliance with the notice as required by ordinance: *City of Fort Smith v. Dodson*, 51 Ark. 447, 14 Am. St. Rep. 62, 11 S. W. 687.

2. **The Time Prescribed.**—When an ordinance prescribes a certain number of day's notice to be given before the sale of an impounded animal, this is an essential prerequisite to the validity of the sale, which cannot be dispensed with by the public authorities. An abridgment of the time for the shortest period will avoid the sale. The requirement is not discretionary nor merely directory, but it is substantial and essential, and its observance peremptorily enjoined: *Clark v. Lewis*, 35 Ill. 417; *Chaffee v. Harrington*, 60 Vt. 718, 15 Atl. 350. In the Illinois case, eight days' notice was given when the law required ten. Under an ordinance requiring the sale of animals that have been impounded for eight days, on the giving of six days' notice, a sale cannot be had until the expiration of fourteen days: *Barre v. Rowe*, 78 Mich. 648, 44 N. W. 335. See, too, *Rounds v. Stetson*, 45 Me. 596; *White v. Haworth*, 21 Mo. App. 439. In computing the time, the day posting the notice is excluded: *Chaffee v. Harrington*, 60 Vt. 718, 15 Atl. 350. And if notice is required to be given "for six successive days," a sale on the 28th of the month, under a notice given on the 22d, is premature and unauthorized: *City Council of Montgomery v. Adams*, 51 Ala. 449.

Not only must the time prescribed by law be observed, but such time must be reasonable. In *Armstrong v. Brown* (the principal

case), ante, p. 207, an ordinance providing for five days' notice was held reasonable; in *Moore v. State*, 11 Lea, 35, an ordinance providing four days' notice after the animals had already been in the pound three days was upheld; and in *White v. Haworth*, 21 Mo. App. 439, an ordinance providing for only three days' notice, after the owner had been allowed five days in which to redeem his property, was sustained. To the same effect see *Hellen v. Noe*, 25 N. C. 493. But an ordinance permitting the sale of impounded stock under two days' notice is pronounced unreasonable and void in *Mincey v. Bradburn*, 103 Tenn. 407, 56 S. W. 273.

e. **Status of Nonresident Owners.**—Nonresidents are not exempt from an ordinance providing for the impounding and sale of animals found running at large within the limits of a municipality. True, an ordinance cannot have any extraterritorial force. But such proceedings are virtually in rem, and rest upon the seizure of the animals, not on the residence or domicile of the owner. It is enough that they are found within the town or city. That their owner is a nonresident is immaterial: *Mayor v. Lanham*, 67 Ga. 753; *Friday v. Floyd*, 63 Ill. 50; *Horney v. Sloan*, 1 Ind. 266; *McKee v. McKee*, 8 B. Mon. (Ky.) 433; *Spitler v. Young*, 63 Mo. 42; *Rose v. Hardie*, 98 N. C. 44, 4 S. E. 41; *Aydlett v. Elizabeth City*, 121 N. C. 4, 27 S. E. 1002; *Knoxville v. King*, 7 Lea (Tenn.), 441; *State v. Nohl*, 113 Wis. 15, 88 N. W. 1004. The legislature is competent, however, to impose less onerous conditions, in respect to the poundage of animals, upon the nonresidents of cities than on residents: *Broadfoot v. City of Fayetteville*, 121 N. C. 418, 61 Am. St. Rep. 668, 28 S. E. 515.

SCHAUF v. CITY OF PADUCAH.

[106 Ky. 229, 50 S. W. 42.]

NEGLIGENCE—Trespassing Child.—A municipal corporation is not liable for the death by drowning of a trespassing child who voluntarily wades beyond his depth into an uninclosed pond on a city lot not in proximity to any highway. (p. 221.)

T. E. Moss, for the appellant.

L. D. Husbands, for the appellee.

229 HOBSON, J. Some years ago the city of Paducah bought a piece of land outside of the city limits, from which it got gravel; from the gravel being removed a considerable excavation was made, which in the course of time filled with water, and was used as a bathing and fishing place. After this

the limits of the city were extended so as to include this pond, which stood out in the commons, and some distance from any highway. Appellant lived in the city about a mile from the pond. His little son, seven years of age, went down to visit a relative, living not far from it. While crossing the common the boy caught a bird, and, seeing some children fishing at the pond, he went over to where they were fishing. The bird got away from him, and fluttered out on the water. The child waded in after the ²³⁰ bird. It fluttered out farther from him on the water. He, following it, got in over his depth, and was drowned, there being no one present large enough to pull him out. For this, appellant, as administrator of the child, brought suit against the city, alleging that the death of the child was due to its negligence. At the conclusion of the evidence for appellant the court instructed the jury peremptorily to find for the appellee.

Appellant relies on *Bransom v. Labrot*, 81 Ky. 638, 50 Am. Rep. 193, as sustaining a recovery in this case. In that case children were allowed to play about a pile of lumber insecurely placed, which, for this reason, fell on a child and killed it. The court likened the case to that of a man setting a trap upon his premises, and it was on this ground that the judgment was rested. But accumulations of water are common about all cities, especially river towns. A large part of the farm houses of this state have ponds about them. The city was under the same obligation as any other lot owner, and no more. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the bank, but from his voluntarily wading out in the pond some ten feet after the bird. It was not the duty of the city to provide against such a contingency as this.

In *Gillespie v. McGowen*, 100 Pa. St. 144, 45 Am. Rep. 365, a boy eight years old, while fishing in a well in an old brickyard, fell in and was drowned—a stronger case for the plaintiff than we have here—yet it was held that there could be no recovery. The court said: “We are unable to see anything in this case to charge the defendants with negligence in not inclosing their lot or guarding the well. There was ²³¹ no concealed trap or dead-fall, as in *Hydraulic Water Co. v. Orr*, 83 Pa. St. 332. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this re-

spect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds, and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may fall from its branches. Yet the principle contended for by plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." To the same effect, see 2 Shearman and Redfield on Negligence, sec. 715; Bishop on Noncontract Law, secs. 845, 954, and cases cited.

Judgment affirmed.

Injuries to Children from falling into wells, pools, and ponds are considered in the monographic note to Barnes v. Shreveport City R. Co., 49 Am. St. Rep. 423-426. A city is not answerable for the death of a child from drowning in a pond situated on private property, not in dangerous proximity to a public highway, although it created the pond: Omaha v. Bowman, 52 Neb. 293, 66 Am. St. Rep. 506, 72 N. W. 316. And in action against a city for the death of children drowned while skating on an uninclosed pond, located partly on a street and partly on adjoining land, no recovery can be had unless the accident happened on that portion of the pond located in the street: Arnold v. St. Louis, 152 Mo. 173, 75 Am. St. Rep. 447, 53 S. W. 900. As to the liability of a private owner of a pond to trespassing children, see Heimann v. Kinnare, 190 Ill. 156, 83 Am. St. Rep. 123, 60 N. E. 215; Cooper v. Overton, 102 Tenn. 211, 73 Am. St. Rep. 864, 52 S. W. 183; Peters v. Bowman, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598.

SUMRALL v. COMMERCIAL BUILDING TRUST'S ASSIGNEE.

[106 Ky. 260, 50 S. W. 69.]

BUILDING AND LOAN ASSOCIATIONS—Insolvency.—Preferred Stock of an insolvent building and loan association is not entitled to preference over the common stock in the distribution of assets in the absence of an express provision to that effect in the charter of the association. In such case the stock is preferred only in the sense that it has priority over the common stock in the distribution of dividends in a going concern. (pp. 226, 229.)

Caruth, Chatterson, & Blitz, Sumrall & Sumrall, Watts & Watts, W. J. Watts, and J. S. Botts, for the appellants.

J. C. Poston, C. Dallam, M. B. Bowden, W. Furlong, J. Roberts, and Fairleigh, Straus & Eagles, for the appellees.

266 HAZELRIGG, C. J. The Commercial Building Trust is a corporation organized in February, 1892, under chapter 56 of the General Statutes. The general nature of its business was to "lend its money to its stockholders, especially with the view of aiding them to procure homes, and, in case of a surplus not needed by the stockholders, to other persons": Articles of Incorporation, p. 8. The object of the corporation was "to afford its members a safe and profitable investment for their earnings, and an opportunity to obtain loans upon easy terms, to purchase homes, and establish themselves in business": By-laws, p. 9.

The capital stock was to consist of ten million dollars—one hundred thousand shares, of the par value of one hundred dollars each—of preferred stock; and one million dollars—one thousand shares, of the par value of one thousand dollars each—of common stock. The former, or preferred stock, was to be subscribed for and paid in upon such terms, and at such times, as the by-laws might prescribe; being in installments of small amounts, payable periodically or in larger payments, at the election of the subscriber. The common stock was to be subscribed for and paid in upon such terms, and at such times, as the board of directors might, from time to time, determine, and it might be issued in monthly or other periodical series. We conclude, therefore, that the business of the concern, to all practical intents, was that of an ordinary building and loan association, so extended and amplified, however, as to embrace objects and purposes wholly foreign to such associations proper,

and which have been condemned by this court in numerous cases.

The articles of incorporation provide that "the preferred ²⁶⁷ stock is guaranteed by this corporation to mature, and be payable, in seven years from the date of the payment of the first installment paid on said stock." And a by-law provides that the funds of the common stock "shall constitute the guaranty for the maturity of the preferred stock."

This preferred stock was to be issued in various classes, in some of which the dividend to be paid was at the rate of eight per centum per annum, and in others at the rate of ten per centum per annum, all payable semi-annually.

As soon as organized, the corporation began business, and issued from time to time both common and preferred stock. Becoming insolvent, however, it made, in June, 1897, for the benefit of its creditors, an assignment of all its assets to the Columbia Finance and Trust Company. In the administration of the trust, the question was presented to the chancellor, in a suit brought for a settlement of the estate, whether, there not being enough money to pay the alleged preferred stockholders in full, the entire funds of the corporation should be distributed to them, to the exclusion of the common stockholders.

The chancellor answered this question by holding "that none of the stock of the defendant corporation is entitled to a preference over other stock in said corporation, and that all stockholders, indiscriminately, shall share equally in the distribution of the assets of the corporation in the hands of the assignee, in proportion to the amounts paid into the corporation by them, respectively, on their stock, after the payment of its debts, and the proper costs, expenses, and charges of the assignee in the execution of the trust."

The correctness of this judgment is the sole question presented on this appeal. Without reference, for the present, ²⁶⁸ to certain interesting questions ably discussed by counsel, involving the validity of the issual of preferred stock by this corporation, we turn at once to a consideration of the terms of the contract by which the corporation guaranteed that its preferred stock should "mature and be payable in seven years from the date of the payment of the first installment paid on said stock."

This is the only provision on the subject of guaranty to be found in the articles of incorporation, and it seems to apply

only to installment stock. So construing it, the provision means simply that, upon the subscriber for this stock making his monthly payments of sixty cents per share for the period of seven years, or fifty dollars and forty cents in the aggregate, the corporation guaranteed that the dividends thereon would so accumulate as that the stock would be worth one dollar per share. Putting the guaranty in another form, the corporation guaranteed that it would declare, at the end of seven years, a dividend of forty-nine dollars and sixty cents on each share of preferred installment stock, but this stock is to be paid for in monthly installments of sixty cents per month.

In the by-laws, however, there is a further provision, by which the corporation "guaranteed the maturity of class "D" installment stock in seven years from the date of the first month's dues paid thereon, and class "E" installment stock in ten years from the date of the first month's dues paid thereon, and class "F" paid-up stock in seven years from the date of its issuance. Here, again, is merely a guarantee that dividends sufficient to mature certain classes of installment stock and a class of paid-up stock would be declared at the end of seven years. The subscribers to this stock were members of the association, and participants in the scheme of so loaning out its funds as that the usurious rates were ²⁶⁹ to be realized. It was by reason of the unlawful and usurious character of this scheme, which was adopted by the association with the approval and by the votes of these members or their representatives, that the enterprise failed of execution; and, when it failed, the so-called "guarantee" was at an end.

Moreover, the guarantee on the part of the company that it would declare, in a given time, certain dividends, or dividends sufficient to mature certain stock, or an agreement that it would set apart certain other stock as a guarantee of such dividends, cannot be enforced unless there are net profits—dividends proper—out of which the guarantee can be made good and the dividends paid. The reason is because the contract does not, and cannot, in the nature of things, create the relation of debtor and creditor. The member is a shareholder in the association—a preferred one, it is true—when there are profits out of which he may be paid; otherwise not. Mr. Cook, in his work on Corporations, says (section 271): "The law is now clearly settled that a preferred stockholder is not a corporate creditor. A contract that dividends shall be paid on

the preferred stock, whether any profits are made or not, would be contrary to public policy, and void. An agreement to pay dividends absolutely and at all events, from the profits when there are any, and from the capital when there are not, is an undertaking which is contrary to law and is void. Public policy condemns, with emphasis, any such undertaking on the part of a corporation as to its preferred or guaranteed shares": See, also, *Taft v. Hartford etc. R. R. Co.*, 8 R. I. 310, 5 Am. Rep. 575; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

The contract, then, is a guarantee of dividends sufficient to mature the stock, and is enforceable ²⁷⁰ only if there are profits sufficient for that purpose. In this insolvent association there are no profits, and there can be no dividends, a guarantee to the contrary notwithstanding. This may not be very material to appellant, as he is reaching after the capital and all assets on hand not profits. But it follows from what we have said that the guarantee has reference solely to a preference in the distribution of dividends. It has no reference to a distribution of assets apart from dividends, and especially no reference to such distribution on the winding up or insolvency of the concern. The agreement to make enough profits to mature the preferred stock in seven years, and a pledge of the common stock for that purpose, looked to a going concern; at least, it was expected to be a live and running association for seven years. It is not contended the guarantee was that the corporation was to last for that time. We think it clear that the period of winding up having arrived, with no profits on hand, the distribution of the capital and assets of the concern is not to be controlled by a provision or guarantee looking solely to the maturity of stock, or, what is the same thing, the distribution of dividends, in due course, in a running or going association.

In *re London India Rubber Co.*, L. R. 5 Eq. 519, there was a provision in the company's charter securing to preferred stock a bonus or dividend out of money produced by the sale of certain property, not required by the company in the conduct of its business. This property was, in effect, pledged to the preferred stockholders, to secure this bonus or dividend, just as it is argued here we have a charge on the common stock to secure the maturity of the preferred stock by dividends large enough to mature it. It was argued in that case that the bonus or dividend should be paid out of the proceeds of the property when sold. The ²⁷¹ court, however, said: "But I

think it is plain that the one hundred and sixty-first clause is directed to a going or continuing concern. It does not, in the slightest degree, contemplate a breaking up of the company, and is not intended to define the rights of the parties in the happening of that unfortunate event. This clause has no application to the event which has happened. The fund is not dividend. It represents the capital of the company, and, not being otherwise provided for, it must, in my opinion, as I originally decided, be divided among the shareholders pro rata, according to the amount of capital which each shareholder has in the concern; in other words, among the two classes of shareholders equally. I wish it to be considered that I decide the case upon this principle: That where there is a provision for preferential dividends, but no provision for the division of capital, upon the breaking up of the concern any surplus must be distributed among shareholders according to their capital, without reference to their rights in respect to dividends."

So we think here the by-laws providing that the funds of the common stock shall constitute the guarantee for the maturity of the preferred stock means that the common stock fund was a guaranty for the accumulation—the earning—of sufficient profits or dividend to mature the preferred stock, in a continuing association, and continuing, too, on a plan or scheme well known to all its members. There is no provision in the corporation's charter or its by-laws, or in any of the certificates of stock or indorsements or specifications accompanying the stock, declaring that there was to be any preference given one class of stock over another in the capital or body of the concern. In the absence of such a provision, the stock is preferred only in the sense that it has priority in the distribution of dividends. The ²⁷² contract we are considering, then, by fair construction, refers only to preferential dividends, and this is the ordinary effect to be given the use of the words "preferred stock."

In Cook on Stockholders, third edition, section 267, it is said: "By 'preferred stock' is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings. In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend can be paid." And the same author (section 278) says: "Upon the dissolution of a corporation, and the distribu-

tion of its assets among the shareholders after the payment of the corporate indebtedness, it is the settled rule of law that, in the absence of any provision in the statutes, by-laws, or certificate to the contrary, preferred stockholders have no priority over common stockholders": See, also, Beach on Private Corporations, sec. 507; 2 Waterman on Corporations, sec. 155; 2 Thompson on Corporations, secs. 2278-2280.

When we bear in mind that the corporation we are dealing with is a building and loan association, with certain underlying principles of co-operation, equality, and mutuality in its make-up not common to ordinary corporations, and which may be termed the "common law of its existence," the objections to upholding preferential contracts among members become apparent.

All such attempts are absolutely void, as contrary to the natural law of such associations. If their managers may attract investors by selling them preferred stock—preferred either as respects dividends or capital—the burdens of maintaining the organization, and in all probability all the losses of the concern, ²⁷³ in case of embarrassment or insolvency, will fall on the very class of members who were primarily intended to be benefited by such associations. In *King v. International etc. Investment Union*, 170 Ill. 135, 48 N. E. 677, it was said: "The plan of issuing stock containing such agreements is entirely foreign to the purposes of the corporation contemplated by the statute under which the one at bar was organized, and we can but regard it as of no force and effect" To the same effect are the cases of *Trowbridge v. Hamilton*, 18 Wash. 686, 52 Pac. 328, and of *Wierman v. International etc. Investment Union*, 67 Ill. App. 550, although in these cases a by-law undertook to authorize the contract of preference. In the case of *Latimer v. Equitable etc. Inv. Co.*, 81 Fed. 776, the question arose as to whether or not a building association, established under the statutes of Missouri, substantially similar to those of Kentucky, could provide for the issuance of paid-up stock, and secure its redemption by a trust deed upon its assets. The court held that, independent of statutory provision, a building and loan company had an implied power to receive a prepayment of its stock, and to issue paid-up stock, but that any attempt to give a preference to such stock was against the policy of the common law governing such institutions, and was against the policy of the statute, and was absolutely void. In passing upon the question in that case, the court said: "The

next and last question to be considered is whether the complainant, as the holder of the certificates in question, is entitled to any preferential right in and to the property undertaken to be pledged to secure their payment. This must be answered by determining whether the defendant association had the power to make the contract so pledging such property. 'The elementary working principle of the building association scheme,' according to Endlich (Endlich on Building Associations, sec. 122), is 'system of ²⁷⁴ perfect mutuality and reciprocity and equality of all members.' No provision is found in the organic law authorizing an association like the defendant to pledge any of its assets for the retirement or payment of any of its stock, nor is there any general power conferred by statute upon loan and building associations to issue preferred preferential stock, from which authority for pledging its assets to secure the payment of any of its stock may be inferred. Under such state of facts, it must, in my opinion, be held that the pledge of corporate assets for the retirement or payment of a certain class of its stock, in preference to others, is so violative of elementary requirements of equality and mutuality as to be absolutely void." We fully concur, therefore, in the chancellor's judgment denying any preference to the so-called preferred over the common stockholders in the distribution of the assets of this association. The suggestion that the appellees have not in fact paid anything into the concern on their stock is guarded against in the orders below by requiring proof of all claims, in the usual way, before the master. The judgment is affirmed.

The whole court sitting.

Preferred Stock.—The interest which holders of preferred stock acquire by reason of the preference given relates to the distribution of dividends, to which they have a right paramount to that of the holders of common stock. Ordinarily, this right to a prior dividend is the only preference which is given such stock: See the monographic note to *Heller v. National Marine Bank*, 73 Am. St. Rep. 237.

GIBSON v. COMMONWEALTH.

[106 Ky. 360, 50 S. W. 532.]

HOMICIDE—Murder—Manslaughter.—Death of Abandoned Child from Exposure.—It is a felony for a parent to willfully abandon a helpless child on a cold, raw night and leave it to die from exposure, no matter what the purpose in so leaving it is. If the intent is to kill the child, the crime is murder, but if the act is done with the hope that the child will be rescued or taken care of by some other person, and its death results from the exposure, the crime is voluntary manslaughter. (p. 231.)

J. R. W. Smith, for the appellant.

W. S. Taylor, attorney general, and M. H. Thatcher, for the appellee.

³⁶¹ BURNHAM, J. The appellant was indicted for the murder of her two months old baby, and was found guilty of manslaughter, and sentenced to the penitentiary for three years; and from that judgment this appeal is prosecuted.

³⁶² The main errors upon which she relies for a reversal are: 1. That the testimony in the case did not authorize the verdict of the jury; and 2. That the second instruction, which authorized the jury to find her guilty of manslaughter, did not sufficiently describe that offense.

The testimony discloses that defendant was an unmarried woman, and that she gave birth to a female child on the ninth day of September, 1879, and that on the night of eleventh day of November, thereafter, she left the house where she had been staying since her accouchement, taking the child with her; that she took it some seven or eight squares away, and left it in the yard in front of a residence at the corner of Brook and Breckinridge streets, in the city of Louisville. The baby was placed in a small basket, and was covered with a shawl or other wrap. The night was a cold, raw one, and it was found dead early the next morning by a policeman. The coroner who held the inquest testifies that the child was greatly emaciated, and probably died either from starvation or exposure; the indications after death being about the same, whether it died from one cause or the other.

The defendant testifies that the child was dead at the time she left its body in front of the residence; that it had died early in the morning of the same day; that she had concealed this fact, and kept its body covered up in her bed during the

day, until night, because she was not able to bury it, and did not know what to do with the body; that she left it where she did, that some one might find it and bury it. She says that, after leaving the child on the lot, she went to the house of her aunt, and spent the night, and the next day went to Cincinnati, where she was subsequently arrested. It seems to us that her testimony is very improbable, and she is flatly contradicted by the testimony ³⁶³ of Eliza Smith as to the time when the child died. She says that she saw the defendant with the child alive, and apparently well, late in the afternoon of November 11th, and other witnesses testify to facts that show that it was well a few days before, and that defendant was anxious to be relieved of the burden of its support. We are of the opinion that there was ample evidence to authorize the submission of the case to the jury, and the motion for a peremptory instruction was properly overruled.

The law imposed upon defendant the duty of protecting and caring for her offspring to the best of her ability; and when she willfully abandoned it on a cold, raw night, and left it to die from exposure, she was guilty of a felony, whatever may have been her purpose in leaving it. Wharton, in his work on Homicide (section 304) says: "If a person do or omit to do an act toward another, who is helpless and dependent, which act or omission, in usual, natural sequence, leads to the death of that other, the crime amounts to murder, if the act or omission be intentional; but if the circumstances are such that the person would not be, or could not have been, aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. Thus, where a woman left her child, a young infant, at a door or other place where it was liable to be found or taken care of, and the child died, it would be manslaughter only; but if the child was left at a remote place where it was not liable to be found, and the death of the child ensued, it would be murder." The same doctrine is announced in Bishop on Criminal Law, sections 557, 883, and in 1 Hawkins' Pleas of the Crown, 564.

³⁶⁴ The instructions in the case were as favorable to the defendant as the testimony authorized—especially the "second," on the question of manslaughter. By it the jury were told that "if they believed from the evidence, beyond a reasonable doubt, that the defendant, without malice, but unlawfully, willfully, and feloniously, cast her child upon an open lot, without suffi-

cient shelter or clothing to protect it from the inclemency of the weather, but that said act was done with the hope that it would be rescued or taken care of by some other person before it should freeze to death, but by reason of said exposure it did freeze, then, in that event, the defendant was guilty of voluntary manslaughter."

We think this instruction fairly stated the law on the question of voluntary manslaughter; and, upon the whole case, that there has been no error prejudicial to the substantial rights of the defendant.

Wherefore the judgment is affirmed.

Homicide.—If the Exposure or neglect of an infant, resulting in death, is an act of mere carelessness, wherein danger to life does not clearly appear, the homicide is only manslaughter; but if the exposure or neglect is of a dangerous kind, it is murder: *Pallis v. State*, 123 Ala. 12, 82 Am. St. Rep. 106, 26 South. 339.

MURRAY v. PRESTON.

[106 Ky. 561, 50 S. W. 1095.]

NAVIGABLE WATERS—What are.—It is not essential that the capacity of a stream for floatage should be continuous to constitute it a public highway. It is sufficient if it is ordinarily subject to periodical fluctuations, attributable to natural causes, and recurring regularly like the seasons, and that its periods of high water and navigable capacity for floatage continue a sufficient length of time to make it useful as a highway. (p. 235.)

NAVIGABLE WATERS.—A Public Highway for Floatage in a stream exists when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use. (p. 235.)

WATERS AND WATERCOURSES—Non-navigability—Power of Legislature.—If a stream is not navigable in fact, it cannot be declared navigable by statute so as to deprive the riparian owner, without compensation, of his right to place obstructions in or across it. (p. 235.)

J. Goble, for the appellants.

Stewart & Stewart, for the appellees.

562 HOBSON, J. Appellees had a large quantity of staves on the waters of Chestnut creek, in Johnson county, which they desired to float down the stream, and with this view obtained an act from the legislature declaring it a navigable stream. Appellant owned the land on both sides of the creek near its

mouth, and had placed water gaps across it, in his fencing; he also had a mill and dam, which he had maintained for many years; and he objected to appellees clearing out the stream and floating their staves out. They then obtained an injunction enjoining him from obstructing the stream, and on final hearing the injunction was made perpetual; and he was required not to put any water gaps across the creek, or do anything else that would interfere with its use as a navigable stream. He seeks the reversal of this judgment.

The first question is, What is the effect of the act of the legislature declaring this creek a navigable stream?

The constitution of the state forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of ⁵⁶³ the owners of the adjoining lands. If it was the private property of appellant, within the boundary of his land, the legislature could not divest him of his rights by simply calling it a navigable stream, when it was not one in fact. The rule on this subject is thus stated in *Cooley on Constitutional Limitations* (side page 591): "The question, What is a navigable stream? would seem to be a mixed question of law and fact; and though it is said that the legislature of the state may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the legislature cannot make it so by simple declaration, since if it is private property, the legislature cannot appropriate it to a public use without providing for compensation."

It remains, therefore, to consider whether this creek was in fact a navigable stream when so declared by the legislature. It is not contended that it was navigable for boats or other water craft, but only that it was a floatable stream. The law in regard to this kind of streams is well stated by a standard author as follows: "There is a class of streams which, although not navigable by boats or lighters, are yet susceptible, for the whole or a portion of the year, of valuable use for the purpose of floating logs and other products of the country along their banks to market or to mills, and which are considered, to that extent, navigable. But if such stream, in its natural state, is not floatable, it is absolutely private, and, though made floatable by the owner by artificial means, is not subject to public use, nor where it is only fit for that purpose during high water or periodical freshets. A stream that would not float logs

without the aid of a person in a canoe, or of ⁵⁶⁴ people on the banks, to push them along, and when the logs are frequently injured by the difficulty in passing them through, is not a navigable stream. The public may use a stream for floating logs, although it may injure the riparian owner, or although it may at times be necessary to go upon its banks to effect such floating, and one is not liable to a riparian owner on whose land they strand. But a needless obstruction, or negligence in any respect, will render the party liable": 6 Lawson on Rights, Remedies and Practice, sec. 2928.

In *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298, the supreme court of Maine said: "The stream, in order to have the character of a public highway, must, in and of itself, have a capacity for floating logs. Such a stream, as well as our larger rivers, will, as experience has universally shown, from its windings and the rush of its waters, especially in times of freshets, cast many of the logs which float upon its bosom upon its shores, intervals, and banks, thereby rendering it necessary to go upon such uplands for the purpose of making a clean drive.' Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. . . . While, therefore, it is true that persons driving logs may go upon the banks of our public streams and rivers as necessity may require, it is also true that a stream which is so small and shoal in its bed that no logs can be driven in it without being propelled by persons traveling on its banks is private property, and not subject to such public servitude as is claimed in this case. By the common law it is clear that the public have no right to go upon the banks of ancient navigable rivers for the purpose of towing; and it is said by the court in the case of *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, that ⁵⁶⁵ where a river cannot be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity for public use; and we think such fact is conclusive that no such public servitude exists."

In the subsequent case of *Hooper v. Hobson*, 57 Me. 273, 99 Am. Dec. 770, the same court said: "The water makes and defines the highway. . . . The right which the public enjoys in a navigable stream is, in general, limited by its banks."

It is not essential that the capacity of the stream should be continuous, to constitute it a public highway. It is sufficient if it is ordinarily subject to periodical fluctuations, attributable to natural causes, and recurring regularly, like the seasons, and

if its periods of high water and navigable capacity usually continue a sufficient length of time to make it useful as a highway. After reviewing the authorities in *Thunder Bay Booming Co. v. Speechly*, 31 Mich. 336, 18 Am. Rep. 184, Judge Cooley well sums them up thus: "The doctrine, then, which we derive from the cases, is that a stream may be a public highway for floatage when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use."

The rule stated by these authorities forbids Chestnut creek being ranked as a navigable stream. The proof is clear that it is less than four miles long from its mouth to its head on the top of the ridge. It is about ten feet wide, and, though in time of freshets receiving a considerable volume of water, it runs down in a few hours. Notwithstanding there is a quantity of timber on its watershed, the evidence is very unsatisfactory that it has ever been used to any practicable extent for floating logs or other ⁵⁶⁶ products. It appears that it was not practicable to use it, even for floating the staves out, without going on the banks and poling them along. Upon the principle that the water is the highway, there can be no highway if the quantity of water is insufficient for its reasonable use for this purpose in ordinary stages of high water. The quantity of water in this creek, its width, its use, and the length of time it remained up in time of freshets, all show that it is only what is commonly known as a "brook" or "branch," and as such was the private property of appellant. He could not be required to take down his water gaps across it, or to allow appellees to pass over it with their staves, against his wishes and without compensation: See *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 99; *Lewis v. Coffee County*, 77 Ala. 190, 54 Am. Rep. 55; *Morgan v. King*, 35 N. Y. 453, 91 Am. Dec. 58.

The judgment is therefore reversed and cause remanded, with directions to the court below to dissolve the injunction and dismiss the petition.

The Navigability of a Stream is a question of fact for the jury. A river which in fact is navigable at certain seasons of the year to light draught boats is a navigable stream, whether it has been declared so by the legislature or not: *Griffith v. Holman*, 23 Wash. 347, 83 Am. St. Rep. 821, 63 Pac. 239; *Railroad v. Ferguson*, 105 Tenn. 552, 59 S. W. 343, 80 Am. St. Rep. 908, and cases cited in the cross-reference note thereto. But fresh water streams which have the requisite volume of water only occasionally and for brief periods, as the result of freshets, are unnavigable and private property: *Bayzer v. McMillan Mill Co.*, 105 Ala. 395, 53 Am. St. Rep. 133, 16 South. 923. If a stream is in fact non-navigable, the legislature

cannot make it a public way, and thus take private property for public use without compensation: *People v. Elk River Mill etc. Co.*, 107 Cal. 221, 48 Am. St. Rep. 125, 40 Pac. 531.

The Right to Float Logs in navigable streams and its limitations are considered in *Alabama Lumber Co. v. Keel*, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204; *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537, 28 South. 724.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. COMMONWEALTH.

[106 Ky. 633, 51 S. W. 164.]

CARRIERS—Long and Short Hauls.—Under a Constitutional Provision that it shall be unlawful for any common carrier "to charge any greater compensation in the aggregate for the transportation of passengers or of property of like kind under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance, the fact that competition exists at the longer and not at the shorter distance point does not constitute such a dissimilarity of conditions as authorizes the carrier to charge more for the short than for the long haul. (pp. 237, 239.)

CARRIERS—Constitutional Law—Long and Short Hauls.—If a railroad commission is empowered in special cases to grant relief from a constitutional provision providing that it shall be unlawful for common carriers to discriminate between long and short hauls, it cannot be presumed that such commission will refuse to do so, and thus arbitrarily deprive the carrier of the right to engage in competitive traffic. Hence, such constitutional provision does not deprive carriers of their property without due process of law, nor does it deny them the equal protection of the law. (pp. 238, 240.)

W. Lindsay, W. D. Hines, H. W. Bruce and E. W. Hines, for the appellant.

W. S. Taylor, attorney general, W. W. Rives, and M. H. Thatcher, for the appellee.

635 **HOBSON, J.** Section 218 of the constitution is as follows: "It shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any

common carrier or person or corporation owning or operating a railroad in this state to receive as great compensation for a shorter as for a longer distance; provided, that upon application to the railroad commission such common carrier or person or corporation owning or operating a railroad in this state may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state may be relieved from the operation of this section."

To carry the above into effect, the general assembly enacted the following statute: "If any person owning or operating a railroad in this state, or any common carrier, shall charge or receive any ⁶³⁶ greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars to be recovered by indictment in the Franklin circuit court, or the circuit court of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order the railroad or common carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order

it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the ⁶³⁷ circuit court of which has jurisdiction, in order that the railroad or common carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or common carrier is indicted and prosecuted": Ky. Stats., sec. 820.

Appellant transported coal from Altamont to Louisville at one dollar per ton, and to Elizabethtown at one dollar and thirty cents per ton, while it charged one dollar and fifty-five cents per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter, and made an order in writing, declining to exonerate appellant from the operation of the provisions of the section above quoted; and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and, appellant having been adjudged guilty, it prosecutes this appeal to reverse the judgment imposing a fine upon it of three hundred dollars.

Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with the Western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to noncompetitive points like Lebanon were reasonable, and were unaffected by the reductions referred to which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of the section of the constitution above ⁶³⁸ quoted. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another, and we are referred to numerous decisions of the federal courts so holding. On the other hand, it is contended for the state that to adopt this construction is to emasculate the section, and deprive it of all practical operation and effect.

The precise question thus presented was determined by this court in the case of Louisville etc. R. R. Co. v. Commonwealth,

104 Ky. 226, 46 S. W. 707, 47 S. W. 210, 598, where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation.

It is insisted for appellant that this construction of the section makes it an arbitrary interference with the right of appellant to engage in competitive traffic, depriving it of its property without due process of law, denying it the equal protection of the law, impairing the obligation of its charter contract, and unlawfully interfering with interstate commerce. All of these objections may be considered together.

A railroad is only an improved modern highway. It must, of necessity, be subject to public control, like its predecessor, the turnpike; for the industry and commerce of the country are dependent upon it. To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the ⁶³⁹ community, and utterly out of keeping with the doctrine that they are public agencies, and so have the right to appropriate to their use the property of the citizen against his consent upon making him just compensation. It has been notorious that railroad managers have, by discrimination in favor of certain shippers or a given locality, brought ruin to others. It was the aim of the constitution to require the railroads in the state to treat all localities fairly and with equality; but, as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul under like circumstances and conditions, with full power in special cases "from time to time [to] prescribe the extent to which such common carrier or person or corporation owning or operating a railroad in this state may be relieved from the operations of this section." It is not confined in its power to each shipment as it may be made, but may prescribe, from time to time, a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice may require.

We are unable to see that as yet any right of appellant has

been invaded, or that it has any just cause of complaint. If it be true that the public interests require the discrimination in rates shown in this case, and that no injustice has really been done, it may be that upon presentation of the facts to the railroad commission it would allow the rates to stand, and make an order exonerating appellant from the operation of the section.

It does not appear that appellant has presented its case to the railroad commission, and we infer that it has not ⁶⁴⁰ done so from the fact that this case seems to have been specially prepared to present these questions here, and there is no reference to a similar effort before the railroad commission. Although the commission refused to exonerate appellant on the evidence it had before it, it does not follow that it would still refuse to do so if proper evidence was offered. It represents the whole state, including the railroad and its stockholders as well as other people, and has always shown a laudable zeal for the interest of the entire estate. The power to determine this matter must be vested somewhere, and, the constitution having created a special tribunal for this purpose, we cannot see that the provisions are subject to any of the objections raised by appellant.

If the railroad companies are not allowed to have exclusive control over the rates for the long and short haul, and the sole right to determine when competition exists, and to what extent special rates, for this reason, may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood, self-interests have warped and controlled human judgment. However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve; and no principle of constitutional law is violated when the state, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others.

Counsel for appellant in effect concede in their brief that the state may prevent unjust discrimination, and that if appellant's rates are judicially determined not to be reasonable, it may then be punished.

⁶⁴¹ Their argument, in effect, is that appellant may be punished under the section of the constitution, although its rates are reasonable, and the discrimination is made necessary by competition in trade over which it has no control. This as-

sumes that the railroad commission will allow the interests of the state to suffer from an unjust rule, or that it will do injustice to appellee. We cannot see that a jury is better qualified to pass on the reasonableness of a rate than a skilled commission, nor is it by any means sure that a trial by jury would be in practice any more satisfactory to appellee. It is true the commission may make mistakes; but we see no reason for the apprehension that an impartial tribunal will err more to the prejudice of one of the parties to a controversy than that party might himself to the prejudice of the other, if the solution of the question were left to him alone. It may be the commission, on the complaint referred to, from the evidence before it, concluded that the rate to Louisville was as large as it should be to afford a fair compensation for the haul to Lebanon, or that the competition with another railroad in the state did not justify the discrimination in favor of Elizabethtown. If it erred in any of its conclusions, it has power, from time to time, on further evidence and a fuller hearing, to make such orders as the ends of justice may require; and if the state may control the matter at all, we cannot see that the plan proposed is unfair, or in excess of the rightful police power of the state.

It is urged that this construction of the constitution will allow coal and other freights from without the state to be shipped cheaper than they can be hauled to the same point if shipped within the state, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional ⁶⁴² convention no doubt had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty, and no doubt will be the pleasure of the railroad commission, to so regulate the matter that no injustice shall be done any industry in the state, and the true interests of the commonwealth as a whole shall be promoted.

The interstate commerce act, under the construction that has been given it, has proved a sore disappointment to many of its friends. The subject is new. That act was an experiment. The provision of our constitution is an experiment in another direction. The subject is one of great difficulty, and, if experience does not find our provision to bring just results, it may lead to that system which will do justice to all, and bring these intricate questions to a just and fair settlement.

Judgment affirmed.

Justices Du Relle and Burnam concurred in a dissenting opinion by Mr. Chief Justice Hazelrigg, in which he said that "under the law as construed by the majority opinion, the company must (1) increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon, or (2) decrease the rates from the mines to Lebanon below those charged to Louisville, or (3) depend upon the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper. If the first alternative is forced on the company, the result is a prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property.

"If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable, and at rates below those which afford a fair and just return on the capital invested. This is true, because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just. The proof offered is conclusive on this point.

"The only remaining refuge of the company is to submit its management to the arbitrary will of the commissioners. And this, say this court, in effect, is better than to leave the matter at issue to a jury. I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and precedents.

"I think, in the first place, neither Congress nor the constitutional convention ever intended to vest their respective boards of commissioners with such extraordinary powers, and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellants' property, and to an extent not permissible under either the state or federal constitution.

"In the recent case of *Lake Shore etc. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565, the principle is emphasized that the power of the state, in the matter of regulating railroads, is to be exercised in subordination to the federal constitution, and that railway companies have a constitutional right to manage their own properties, subject only to the exercise by the state of a reasonable supervision. To say that as yet the company is not hurt, because the commission will 'do right,' is but begging the question. Such a construction results in the substitution of a tribunal to try the property rights of the company which is restricted by no legal safeguards. The statute so construed is clearly in conflict with the constitution of the United States.

"In *Chicago etc. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702, the supreme court said: 'This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution

of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.' "

From the judgment in the principal case, a writ of error was prosecuted to the supreme court of the United States, and on January 6, 1902, the judgment of the state court was affirmed. The opinion of the national court, as delivered by Mr. Justice Shiras, and reported in *Louisville etc. R. R. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. Rep. 95, follows:

"This case is here on a writ of error to a judgment of the court of appeals of the state of Kentucky, affirming a judgment of the circuit court of Marion county, Kentucky, sentencing the Louisville and Nashville Railroad Company to a fine of three hundred dollars for an alleged violation of a statute of that state which declares, among other things, that it shall be unlawful for any person or corporation owning or operating a railroad in the state to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for longer distance, over the same line, in the same direction, the shorter being included in the longer distance.

"This statute is based upon section 218 of the constitution of the state of Kentucky, adopted in 1891. The statute, which is section 820 of the Kentucky statutes, and section 218 of the constitution, is set forth in full in the report of the case of *McChord v. Louisville etc. Ry. Co.*, 183 U. S. 483, 22 Sup. Ct. Rep. 165, and cognate cases, recently decided by this court, and need not be here copied at length.

"Those cases were here on appeal from final decree of the circuit court of the United States for the district of Kentucky, enjoining the railroad commission of the state from enforcing against the complainants, of which the Louisville and Nashville Railroad Company, the plaintiff in error in the present case, was one, the provisions of an act of the commonwealth of Kentucky approved March 10, 1900, entitled 'An act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents, and employes from charging, collecting, or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act, and penalties for the violation of its provisions.'

“The occasion of the passage of this act of March 10, 1900, was a decision of the court of appeals of Kentucky holding that section 816, which declared that any railroad company which should charge and collect more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in that state was guilty of extortion, could not be enforced as a penal statute for want of certainty: *Louisville etc. R. R. Co. v. Commonwealth*, 99 Ky. 132, 59 Am. St. Rep. 457, 35 S. W. 129.

“The effort was made in the circuit court of the United States, and successfully, to have it held that by the said act of March 10, 1900, section 819, in so far as it provided an action by way of information, and to liability in damages, and that indictments should be made only on the recommendation or request of the railroad commission, was repealed by necessary implication; and that, accordingly, the order of the commission, fixing the rate, toll, or compensation they may charge, was self-executing, and that no duty to enforce it was imposed on the commission; that the railroad companies were shut up by the act to the final determination of the commission that they have charged more than a just and reasonable rate; that on the trial of indictments for failure to observe the rates made by the commission, the courts cannot entertain any inquiry as to the reasonableness of rates so fixed, because such inquiry is unwarranted by the statute, and, therefore, illusory and worthless; and that, even if the question of constitutionality could be raised in defense, yet that, if the order of the commission were permitted to be entered of record, the companies, if they did not comply, would be at once exposed to innumerable prosecutions and to financial ruin by the accumulation of penalties before a judicial decision as to the validity of the statute could be had, if it should then happen that the statute was upheld.

“It was, however, held by this court that it was not the intent or effect of the act of March 10, 1900, to repeal those provisions of section 819 requiring indictments to be found only on the recommendation of the commission, nor to circumscribe, in this particular, the general duty of the commission to see that the law relating to railroads should be faithfully executed. This view of the meaning and effect of the legislation was that taken by the court of appeals of Kentucky in the case of *Illinois C. R. Co. v. Commonwealth*, decided while the appeals from the decrees of the circuit court of the United States were pending in this court. In that case the railroad company was indicted under section 820, and fined for charging more for a shorter than a longer haul. The indictment was returned before the railroad commission had determined whether the railroad company should be exonerated as provided in that section, and the court of appeals held that, ‘to allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. . . . The long and short haul matter is only another form of undue discrimination and preference, which

are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see Gen. Stats. 1021), which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the state should be looked to in these matters, and that the railroad commission must first determine them before the general juries of the state should find indictments': 23 Ky. Law Rep. 1162, 64 S. W. 977.

"The conclusion reached by this court, therefore, was that the duty of enforcing its rates rests on the commission, and that there was no basis for interposition by a court of equity before the rates were fixed at all; and that whether, after the rates had been determined by the commission, their enforcement could be restrained, was a question not necessarily presented for decision in those cases; and, accordingly, the decrees of the circuit court were reversed with a direction to sustain the demurrer and dismiss the bills.

"In the case now in hand the indictment was found, not in advance of any action by the railroad commission, but on its recommendation. Hence the question of the validity of the provisions of the constitution and the laws of the state of Kentucky under which these proceedings were had is properly before us. Of course, our consideration of it must be restricted to its federal aspect; in other words, we are to inquire whether the state enactments, constitutional and statutory, in the particulars involved in this controversy, and under the construction given them by the court of appeals, are in conflict with the fourteenth amendment of the constitution of the United States.

"At the trial of the indictment it was not seriously disputed that the defendant company had, at the time and place alleged, charged and received for the carriage and transportation of coal over its line of road a greater compensation for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, without having been authorized by the railroad commission so to charge, and after the commission, upon investigation, had refused so to do.

"But certain facts which were alleged to show that the circumstances and conditions under which the charges in question were made and received were not substantially similar with those ordinarily obtaining, and thus to show that the charges objected to were just and reasonable, were offered in evidence by the railroad company, and excluded from the jury by the trial court, which gave to the jury what amounted, in legal effect, to a peremptory instruction to find the defendant company guilty as indicted. The jury accordingly returned a verdict of guilty, fixing the fine at three hundred dollars, for which judgment was rendered, and an appeal was taken by the defendant company from that judgment to the court of appeals.

"It was contended in the courts below and here that as section 218 of the constitution of the state of Kentucky, regulating charges for transportation over different distances, is in terms a copy of the provision on the same subject in the interstate commerce act, it should be assumed that it was the intention of the constitutional convention of Kentucky to adopt the construction put upon that provision in the interstate commerce law by the federal courts; and that as those courts had held that the existence of actual competition of controlling force in respect to traffic important in amount might make out a dissimilarity of circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul, without any necessity to first apply to the commission for authority so to do, that construction should have been followed at the present trial, where evidence was offered tending to show the existence of competition of that character, caused by river transportation of coal from points outside of the state.

"Such contention might seem reasonably to have been urged in the state courts, but, as they have seen fit to disregard it, and to put a different construction upon the language employed, this court must accept the meaning of the state enactments to be that found in them by the state courts. The prevailing view in the court of appeals was thus expressed by Judge Hobson:

"Appellant transported coal from Altamont to Louisville at one dollar per ton, and to Elizabethtown at one dollar and thirty cents per ton, while it charged one dollar and fifty-five cents per ton from Altamont to Lebanon, an intermediate station on its line of road. Complaint being made to the railroad commission, it investigated the matter and made an order in writing, declining to exonerate appellant from the operation of the provisions of section 820, and thereafter, at the suggestion of the commission, appellant was indicted in the Marion circuit court, as provided in the statute. The case was tried, and appellant having been adjudged guilty, it prosecuted this appeal to reverse the judgment, imposing a fine upon it of three hundred dollars.

"Appellant justified the difference of the rate on the ground that at Louisville the coal hauled from Altamont came in competition with the coal brought down the Ohio river on boats, and that at Elizabethtown it came in competition with western Kentucky coal brought there by the Illinois Central Railroad. It insists that these rates could be made no higher on account of this competition, and that the rates to noncompetitive points like Lebanon were reasonable, and were unaffected by the reductions referred to which were necessary for the coal to be handled in those markets at all. The evidence offered by it to sustain this contention was excluded by the court below on the trial, on the ground that competition is not one of the circumstances or conditions exempting the railroad from the operation of section 218 of the constitution. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point

and not in another, and we are referred to numerous decisions of the federal courts so holding. On the other hand, it is contended for the state that to adopt this construction is to emasculate the section and deprive it of all practical operation and effect.

“The precise question thus presented was determined by this court in the case of Louisville etc. Ry. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, 46 S. W. 707, 47 S. W. 210, 598, where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation’: 21 Ky. Law Rep. 234, 51 S. W. 165.

“In order fully to understand the position of the court of appeals it may be well to quote a portion of the opinion of that court in the case of Louisville etc. Ry. Co. v. Commonwealth, 20 Ky. Law Rep. 1380, 46 S. W. 707, referred to in the court’s opinion in the present case:

“The railroad commission was, therefore, created to meet the emergency, and was intended to be invested with full power to authorize or not in special cases less compensation to be charged for the longer than shorter distance, and to prescribe, from time to time, the extent to which the common carrier may be relieved from operation of the section. In our opinion the court has not jurisdiction to either compel the railroad commission, upon application of the common carrier or those interested in particular industries or callings, to suspend or relax operation of section 218, or, upon application of individuals or corporations feeling aggrieved, to prohibit such suspension or relaxation in special cases. While the commission is thus, and to that extent, free from judicial interposition, it cannot, of course, nullify, or, except in special cases, at all suspend operation of, section 218; and though the railroad commission be invested with this unusual power, it must be treated as a constitutional power with which the court cannot interfere.’

“With the meaning thus attributed to section 218 of the constitution, it is strenuously contended on behalf of the plaintiff in error ‘that said section has no reasonable relation to securing for the public reasonable rates or the prevention of extortion or undercharges, or the promotion of the safety, health, convenience, or proper protection to the public; but that it amounts to an arbitrary and wholly unreasonable interference with perfectly legitimate business, and is, therefore, in conflict with the fourteenth amendment of the constitution of the United States; and since the railroad company has built its railroads in the state of Kentucky, upon the faith of a charter granted it by the state authorizing it to operate those railroads, it has a contract right to engage in such legitimate railroad business, and any such arbitrary interference therewith as results from such a construction of section 218 would impair the obligation of that contract.’

“To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws: *Railroad Commission Cases*, sub nom. *Stone v. Farmers' Loan etc. Co.*, 116 U. S. 307, 345, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago etc. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan etc. Co.*, 154 U. S. 362, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. Rep. 418; *Lake Shore etc. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. Rep. 565.

“We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And, accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the federal courts to interfere with the legislative department of the state government when acting within the scope of its admitted powers is always the exercise of a delicate power—one that should not be resorted to unless the reason for doing so is clear and unmistakable.

“As we understand the condition of the statutes of Kentucky, there was at the time when this case was tried in the circuit court of Marion county, and when the court of appeals disposed of it, no power in the railroad commission to fix or establish rates or tolls which the railroad companies were bound to accept. Such power, however, was given to the commission by the act of March 10, 1900; and it was to restrain the railroad commission from taking action under that act that bills in equity were filed by the Louisville and

Nashville Railroad Company and other railroad companies in the circuit court of the United States. But in the present case we have only to do with the question of the validity of the action of the railroad commission's proceeding under section 218 of the constitution and section 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when authorized by the commission to charge less for longer than for shorter distances. As we have seen, this court held, on the appeals from the circuit court of the United States, that it was not competent for courts of equity to interfere with the action of the commission in respect to fixing rates before the rates were fixed at all, and when it could not appear whether the companies would have any reason to complain of them.

"Our present duty is to consider only the objections to the validity of the long and short haul clauses in the constitution and the statutes.

"It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of federal courts when they are asked to interpose in a controversy between a state and its citizens.

"This court, then, is not concerned with the wisdom of the people of Kentucky when they declared in their constitution that it should be unlawful for any person or corporation owning or operating a railroad in that state to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the court of appeals of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

"It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the state to define their powers and to control their exercise of such powers. The question for us, in the present case, is whether the state, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws.

"When the citizens of Kentucky voluntarily seek and obtain a grant from the state of a charter to build and maintain a public

highway in the form of a railroad, it would seem to be evident that they take, hold, and operate their road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that in a given case a railroad company may be able to show that the state has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the states. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. But apart from such contentions, and looking only at the case of a company voluntarily formed to carry on business wholly within a state, we are unable to see how such a company can successfully contend that it can be exempted by the courts from the operation of the constitution of the state.

"It is said that, while it is true that railroad companies receive their right to exist and to maintain their roads from the state, yet that their ownership of such roads is property, and, as such, is protected from arbitrary interference by the state. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the state. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character, the company would be without the protection which courts of equity have heretofore given in cases of that description. What we now say is that a state corporation voluntarily formed cannot exempt itself from the control reserved to itself by the state by its constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the federal courts, in respect to the long and short haul clause in the state constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another; and the remedy adopted by the state was to declare such preferences illegal, and to prohibit any person, corporation, or common carrier from resorting to them. That remedy included in its scope everyone, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the state desired to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the state, are strongly urged on behalf of the plaintiff in error; but however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

“It is further contended that the indictment and the proceedings in this case were void because of the nature of the proviso in section 218 of the constitution. That proviso is in the following words: ‘Provided that, upon application to the railroad commission, such common carrier, or person, or corporation owning or operating a railroad in this state, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such common carrier or person, or corporation owning or operating a railroad in this state, may be relieved from the operations of this section.’

“The argument is that, ‘even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet, where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to intrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided without specifying any conditions upon which the carriers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will, in any and all cases, without judicial review or control.’

“But if it be competent for the state, as this argument supposes, to wholly forbid, in every case and by every carrier the charging of more for a short than a long haul, it is not easy to see why the state may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation. Such an exercise of discretion by the railroad commission would be no more arbitrary than if the constitution had authorized the legislature to allow in special cases a greater charge for the shorter than for the longer distance, and to prescribe the extent of such excess. We are not prepared to accept the view that the railroad commission, in acting under section 218, is merely an administrative body, and, as such, subject to judicial review. It is, rather, a constitutional tribunal, empowered, upon the application of the carrier, to investigate the special circumstances and conditions which are claimed to justify the relief of the carrier from the operation of this section. It is not compulsory upon the carrier to make such application for relief to the commission. If he does not choose to do so, he will continue to operate his railroad under and subject to the constitutional prohibition. If he elects to resort to the commission, he can no more complain that its judgment is final, when it is against his contention, than the community affected can complain when its judgment is in his favor. Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners

to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void: *Shoemaker v. United States*, 147 U. S. 282, 305, 13 Sup. Ct. Rep. 361.

"The plaintiff in error did not choose to avail itself of the right to apply for relief to the railroad commission, perhaps for the reason that doing so might be regarded as an acquiescence in or waiver of the right to object to the validity of the proviso.

"However this may be, it is difficult to see how a federal question is presented by the apprehensions which the plaintiff may entertain that a resort to the commission might be futile. As already said, the railroad company must be deemed to have accepted its grant, subject to the provisions of the constitution; and this presumption is as applicable to the method provided for exoneration from the prohibition as to the prohibition itself.

"We do not put the disability of the company to raise these questions upon the ground of an estoppel, strictly speaking, but upon the proposition that the company takes and holds its franchises and property subject to the conditions and limitations imposed by the state in its constitution: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Davidson v. New Orleans*, 96 U. S. 97; *Railroad Commission Cases*, sub nom. *Stone v. Farmers' Loan etc. Co.*, 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191.

"We are next to inquire whether the plaintiff in error has been exonerated from these constitutional conditions and regulations by a valid contract subsisting between it and the state.

"We do not understand that the counsel for the plaintiff in error claims that, by any provision of its charter, power was given to the company to fix its own rates of charge, or to discriminate in its rates between different places on its line of railroad, and that the constitutional prohibition as to the long and short haul, subsequently enacted, operates, if enforced, as a withdrawal or defeat of that power.

"No right in express terms or by necessary implication is pointed in the company's charter granting to the Louisville and Nashville Railroad Company the privilege of discriminating in its tariff of tolls or charges in favor of longer over shorter distance points. On February 14, 1856, there was passed a general act reserving to the state an unlimited power to amend all charters and amendments thereafter granted: *Ky. Laws 1855-56*, c. 148. It is true that an amendment to plaintiff in error's charter was granted by an act passed February 28, 1860, by section 1, of which the board of directors

were granted authority, 'in their adjustment of a tariff for freight and passengers, to make discrimination in favor of freights and passage for long over short distances.' But it does not seem to be contended that by this amendment of 1860 an irrevocable contract was effected between the state and the company, which could not be affected by a subsequent constitutional enactment. It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be deemed to exist unless it is given expressly, or unless it follows by an implication equally clear with express words.

"But what is claimed is that a railroad company, by mere force of its legal organization and the construction of its road, has a necessarily implied power to fix reasonable rates, and especially has the right to differ rates when competition exists from rates applicable where there is no competition. Such rights, it is said, are essential to enable the company to engage in perfectly legitimate business, and hence that an interference therewith, even by a constitutional enactment, not only deprives the company of its property, or the reasonable use of it, but also impairs the obligation of the contract implied in the grant of its charter.

"So far as the question of an implied contract is concerned, we perceive no distinction between the case of a railroad company incorporated before and that of one incorporated after the constitutional enactment in question. As it has been said of the one, so it may be said of the other, that the charter is taken and held subject to the power of the state to regulate and control the grant in the interest of the public.

"In *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 10 Sup. Ct. Rep. 34, it was held that neither the original charter of the railroad company nor subsequent acts conferring additional privileges constituted such a contract between the state and the company as exempted the latter from the operation of the subsequently adopted constitution of Pennsylvania; that a constitutional provision, as applied to the company, in respect to cases afterward arising, did not impair the obligation of any contract between it and the state; and that the company took its charter subject to the general law of the state, and to such changes as might be made in such general law, and subject to future constitutional provision and future general legislation, since there was no prior contract with it exempting it from such enactments.

"The same principle was announced in *Louisville Water Co. v. Clark*, 143 U. S. 1, 12 Sup. Ct. Rep. 346, and in *Louisville etc. Ry. Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. Rep. 714.

"In the absence, then, of any express prior contract between the state and the company, exempting the latter from future constitutional enactments, and without conceding that even such a contract would avail to relieve the company from constitutional changes in the exercise of the general police power of the state, it is sufficient to say that

we do not find in section 218 of the constitution of Kentucky any impairment of an existing contract between the state and the plaintiff in error.

"The final contention that section 218 of the constitution of Kentucky operates as an interference with interstate commerce, and is, therefore, void, need not detain us long.

"It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the state, and the long and short distances mentioned are evidently distances upon the railroad line within the state. The particular case before us is one involving only the transportation of coal from one point in the state of Kentucky to another by a corporation of that state.

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state: *New York etc. Ry. Co. v. Pennsylvania*, 158 U. S. 431, 439, 15 Sup. Ct. Rep. 896; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 17 Sup. Ct. Rep. 532.

"A discussion of this subject will be found in the opinion of this court in *Louisville etc. R. R. Co. v. Kentucky*, 161 U. S. 701, 16 Sup. Ct. Rep. 714, where the same conclusion was reached.

"The judgment of the court of appeals is affirmed."

In the case of *Louisville etc. R. R. Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. Rep. 277, the validity of section 218 of the Kentucky constitution was again involved, and it was held that it was an unconstitutional regulation of interstate commerce in so far as its provisions extend to a long haul from a place outside to one within the state, and a shorter haul between points on the same line, and in the same direction, both of which are within the state. The opinion of the court as delivered by Mr. Justice Peckham, follows:

"The writ of error in this case does not bring up for review any judgment of the court of appeals of the state of Kentucky, the highest court of that state. It appears that the circuit court of that state is the highest court in which a decision of the case could be had, presumably on account of the amount of the judgment. There was no opinion delivered by the judge holding the court in which the case was tried, and, as the case did not go to the highest court of that state, we are without the benefit of any written opinion of the courts of Kentucky in regard to the question involved. We have already held, in the case of *Louisville etc. Ry. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. Rep. 95, that the section of the Kentucky constitution

above set forth, as applied to places all of which are within the state, violates no provision of the federal constitution.

“The effect of the decision of the state court now under review is to hold that the provision of section 218 of the state constitution is not confined to a case where the long and short hauls are both within the state of Kentucky, but that it extends to and embraces a long haul from a place outside of to one within the state, and a shorter haul between points on the same line and in the same direction, both of which are within the state; and the question is whether the provision of that constitution as thus construed is or is not a violation of the commerce clause of the constitution of the United States.

“It would seem that the foundation upon which the validity of the constitutional provision is based is the theory that it operates solely upon the rate within the state, making that rate unlawful if it exceed the rate for the longer distance over the same line in the same direction, though, as in this case, the longer distance is from Nashville, Tennessee, to Louisville, Kentucky. The claim must be that the only effect of the provision is to regulate the rate between points within the state, and that it has no direct effect upon, nor does it in any degree regulate or affect, the rate between points outside and those points which are within the state. The contention is that the state does not prescribe or regulate the rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce. It simply directs that between points within the state of Kentucky the charge shall not be greater for a shorter haul than for a longer haul, even though such longer haul may be between a point outside and one inside of the state; that this does not constitute an interference with or a regulation by the state of interstate commerce, and hence the provision is valid.

“If this contention were correct, and the constitutional provision as construed by the state court did not by its enforcement regulate or immediately and directly influence and affect the interstate commerce of defendant, either as to the amount or rates, the provision in question would be valid. But is it correct? And is there no such immediate influence upon or regulation of the interstate commerce of the defendant?

“By the demurrer and the motion for judgment on the pleadings it is admitted that the rates from all points on the defendant's road within the state of Kentucky to Louisville for the transportation of tobacco are not too high, but are, in fact, just and reasonable in themselves, and to that extent the general obligation of a carrier to make charges that are just and reasonable is fulfilled. There is also a rate for the transportation of tobacco from Nashville to Louisville of twelve cents per one hundred pounds, and that rate is arrived at because of the existence of water competition between the two points which absolutely prevents the company from making a greater charge, for if it did it would get no business; and yet, on account of the fact that trains are to be run in any event and expenses incurred by rea-

son of the operation of the road, it pays the company to take the tobacco at the rate named, even though it is below what would otherwise be a fair and reasonable compensation for the transportation. It follows, therefore, and the fact is averred, that although under the circumstances it pays the company to transport the tobacco from Louisville at the rate of twelve cents per one hundred pounds, yet if it were confronted with the alternative of either giving up such transportation (which a charge of twenty-five cents per one hundred pounds would necessarily result in) or of reducing the charge from Franklin to Louisville to twelve cents per one hundred pounds for tobacco, it would be compelled to give up the transportation from Nashville rather than reduce the charge from Franklin to Louisville. If the state of Kentucky has the right to base its provision for the rate of a short haul within its own borders by comparison with the rate for a longer haul partly within and partly without its own borders, notwithstanding the direct effect of a limitation arrived at by such comparison may be the regulation, or even the suppression, of the interstate commerce of the carrier, then this provision is valid; otherwise it would seem to be the reverse.

"That the railroad commission is authorized upon application to permit the company to charge less for longer than for shorter distances is immaterial. If the provision in question, if enforced, does directly affect interstate commerce, its invalidity is not cured by the fact that if the railroad commission should choose it might permit the interstate charges to remain. In either case the interference is illegal.

"The result of the construction of this provision by the court below is in effect to prohibit the carrier from making a less charge for the transportation from Nashville to Louisville than from Franklin to Louisville, or else to make a charge that will prevent its doing any business between the states in the carrying of tobacco. The necessary result of the provision under the circumstances set up in the answer directly affects interstate rates, or, in other words, directly affects interstate commerce, for it directly affects commerce between Nashville and Louisville. The fact is not altered by putting the proposition in another form, and saying that the constitutional provision only prevents the carrier from charging a greater sum for the shorter distance from Franklin to Louisville, both within the state, unless the consent of the railroad commission is obtained, because in either event the charge from Nashville to Louisville enters into and forms a part of the real subject matter of the provision, the greater sum for the shorter distance within the state being compared with the lesser sum for the longer distance without the state; and the prohibition is absolute, unless the consent of the commission is obtained, from charging any more for the shorter distance within the state than for the longer distance, partly within and partly without the state. And in this case, in order to maintain its state rate, it must fix its interstate rate at an amount which prohibits its doing interstate business.

"We fully recognize the rule that the effect of a state constitutional provision, or of any state legislation upon interstate commerce, must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated; and in that event the effect of the provision is direct and important, and not a mere incident.

"Although not exactly in point, yet the case of *Wabash etc. R. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4, is somewhat analogous in principle. In that case chapter 114 of the Revised Statutes of Illinois, section 126, came under consideration. That section enacted that if any railroad corporation should charge for the transportation of freight, etc., upon its railroad, for any distance within the state the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger, etc., over a greater distance of the same road, such charges should be deemed prima facie evidence of unjust discrimination prohibited by the act, and penalties were provided for its violation.

"An action was brought to recover for a violation of the provisions of the act, and in the declaration it was alleged that the company charged Elder & McKinney for transporting goods from Peoria, in the state of Illinois, to New York city at the rate of fifteen cents per one hundred pounds, and on the same day the company charged Bailey & Swannell for transporting another carload of the same kind of goods from Gilman, in the state of Illinois, to the city of New York at the rate of twenty-five cents per one hundred pounds, although the carload transported for Elder & McKinney from Peoria was carried eighty-six miles further in the state of Illinois than the other carload of the same weight; and it was claimed that, as the freight was of the same class in both instances, and carried over the same route, except as to the difference of distance, a discrimination against Bailey & Swannell was made in the charges against them, as compared with those given to Elder & McKinney, and hence suit was brought. Mr. Justice Miller delivered the opinion of this court, in which he expressed some doubt whether the statute of Illinois had been correctly construed by the court below, yet, as that court had given an interpretation to it which made it apply to commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was within the same state, this court was held to be bound as to the construction given to the act by the state court. What that construction was is stated by the court itself. It said: 'We see no reason to depart from the conclusion reached in this case when it was here before: See *People v. Wabash etc. Ry. Co.*, 104 Ill. 476. But to avoid misapprehension we

deem it advisable to state explicitly that we disclaim any idea that Illinois has authority to regulate commerce in any other state. We understand and simply hold that, in the absence of anything showing to the contrary, a single and entire contract to carry for a gross sum from Gilman, in this state, to the city of New York, implies, necessarily, that that sum is charged proportionately for the carriage on every part of that distance; and that a single and entire contract to carry for a gross sum from Peoria, in this state, to the city of New York, implies the same thing; and that, therefore, when it is shown that there is charged for carriage upon the same line less from Peoria to New York (the greater distance) than from Gilman to New York (the less distance), and nothing is shown to the effect that such inequality in charge is all for carriage entirely beyond the limits of this state, a *prima facie* case is made out of unjust discrimination under our statute occurring within this state. We hold that the excess in the charge for the less distance presumably affects every part of the line of carriage between Gilman and the state line proportionately with the balance of the line. The judgment is affirmed': *Wabash etc. Ry. v. Illinois*, 105 Ill. 236.

"In regard to this question, Mr. Justice Miller, in the course of his opinion, said: 'It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the state, and so much more to commerce in other states. The transportation, which is the subject matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the state of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other, in the state of Illinois, and the city of New York, in the state of New York?'

"The court held it was the latter, and said, after examining the other cases (118 U. S. 575, 7 Sup. Ct. Rep. 12): 'We must therefore hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a state which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the states, is a valid law.'

"In regard to the effect of the Illinois statute upon interstate commerce, it was further said: 'Let us see precisely what is the degree of interference with transportation of property or persons from one state to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the state of Illinois. A continuous line of rail over which a car loaded with these goods can be carried and is carried habitually connects the place of shipment with the place of delivery. He undertakes to make a contract with a per-

son engaged in the carrying business at the end of this route, from whence the goods are to start, and he is told by the carrier: "I am free to make a fair and reasonable contract for this carriage to the line of the state of Illinois; but when the car which carries these goods is to cross the line of that state, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that state, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that, while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per one hundred pounds, he is not permitted to do so, because the Illinois railroad company has already charged at the rate of twenty-five cents per one hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

"So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per one hundred pounds for a carload, but is compelled to pay at the rate of twenty-five cents per one hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per one hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the supreme court of that state. The effect of it is that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.'

"Is not this reasoning applicable here? The Nashville owner of tobacco wishes to have it transported to Louisville, and asks the defendant to carry it. It responds that it would like to carry it at the rate of twelve cents per one hundred pounds, but that it cannot do so because it has established a reasonable rate between points both of which are in Kentucky, and which rates are more than twelve cents, and that if it were to carry at the rate of twelve cents from Nashville to Louisville, it would be necessary, on account of the law of Kentucky, to carry at the same rate all tobacco between all points in that state which would entail a loss in the business between those points which the company would not be justified in sustaining; therefore the transportation is declined, for it cannot get more than twelve cents from the Nashville man. Is it an answer to this statement to say that the company can get this business by lowering its rates within the state to the same rate as charged from

Nashville? Is it bound, in order to secure this interstate commerce, to lower its rates all through the state? If it be, is not the law which accomplishes this result a direct interference by the state with interstate commerce? And if it do not lower its state rates, and in consequence must raise its interstate rates in order to make its state rates valid, and thus must lose to an appreciable and important extent the interstate commerce, is not a law from which such necessary and direct consequences result a regulation in effect by the state of that commerce which ought to be free therefrom?

"In *Hall v. De Cuir*, 95 U. S. 485, it was said: 'But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.'

"The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state.

"The facts in this case have been thus fully referred to for the purpose of showing how directly and also how injuriously such a provision might affect interstate commerce. Other cases may be supposed where the effect might not be so oppressive. But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision, or by legislation, to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the constitution of the United States gives to the federal Congress.

"It has been urged that, assuming Congress to have the power to fix interstate rates, if that body should prescribe the interstate rate for the transportation of commodities (tobacco, for instance) from Nashville to Louisville, for a railroad carrier, that the state might then fix the local rates by that standard, and if so, why could it not do the same thing when the carrier itself fixes its interstate rate? In the case supposed, the rate is fixed and the interstate commerce regulated by the body which has the power to impose such rate on the carrier and to regulate its interstate commerce. The state might, in the case supposed, enact that the road should not charge more, or at a greater rate, for a short haul within the state than Congress provided for the long interstate haul. The reason is that Congress, in the case presented, is assumed to have the power to direct and regulate the interstate rate, and having that power and exercising it, the state could then provide that its internal charge should not exceed that rate, and there would be in that case no interference with or regulation of interstate commerce, directly or indirectly by the state, its action could have no possible effect upon the interstate rate, as the amount of the charge would be regulated by the body with which the right of regulation exists.

"It seems also to be thought that there is no regulation of com-

merce, provided it is not interfered with or regulated in all ways by which transportation of commodities between interstate localities may be accomplished; that if the commodity (tobacco in this case) can be transported by any other means or route, or by any other individual or corporation, than the one affected by the regulation, commerce is not regulated within the constitutional meaning. On the contrary, it seems quite clear that any law which, in its direct result, regulates the interstate transportation of a single individual carrier, or company of carriers, violates the provision in question; that it is no answer to say the commodity can still be transported by another carrier, or by water instead of rail, so long as the direct effect of the state legislation is to regulate the transportation of the commodity by a particular means, by rail instead of by water, or by a particular individual or company.

"It is also argued that if Congress should enact that an interstate rate shall be the sum of the local rates prescribed by the several states for the parts in the line within its borders, it could not correctly be maintained that such enactment would amount to an interference with the power of the state over local rates, and the mere fact that Congress accepted the local rates and made them the basis of an interstate rate could not be held to be an interference by Congress with local commerce; and if not, how can it be held an interference by the state when it recognizes existing interstate rates as a basis for its legislation concerning local rates? We think there is no analogy between the two cases.

"In the case supposed the states have fixed the local rates within their respective borders, and the action of Congress in fixing their sum as the rate for interstate commerce does not in any way regulate or interfere with the respective state rates already, or from time to time, adopted by the state. In thus fixing the interstate rate, Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and, on the other hand, the state by such a statute regulates the local rate, but that it has the right to do.

"Congress does not, directly or indirectly, interfere with local rates by adopting their sum as the interstate rate.

"In the case at bar the state claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to an interference with, and a regulation of, commerce between the states, carried on, though it may be, by only a single company.

"We are of opinion that as construed by the state court, and so far as it is made applicable to or affects interstate commerce, the two hundred and eighteenth section of the constitution of Kentucky

is invalid, and the judgment of the circuit court of Simpson county, Kentucky, is therefore reversed, and the case remanded to that court for such further proceedings therein as shall not be inconsistent with this opinion.

“And it is so ordered.”

Mr. Justice Gray concurred in a dissenting opinion written by Mr. Justice Brewer, in which the latter said:

“I am unable to concur in the opinion and judgment in this case. We have just held that section 218 of the constitution of Kentucky and section 820 of the Kentucky statutes, based thereon, are not in conflict with the constitution of the United States when applied to a case in which both the long and the short haul are wholly within the state: *Louisville etc. Ry. Co. v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. Rep. 95. The constitutional section, briefly stated, forbids a carrier from charging more for a short than for a long haul within which the short haul is included. The prohibition is upon the short haul charge. There is no prohibition in respect to the long haul charge, no restriction of the power of the carrier over it, no regulation concerning it, no prescribing by whom or how or when it shall be made—all this is absolutely untouched by the section.

“The proposition now advanced is that while the state may constitutionally prohibit a short-haul charge in excess of a long-haul charge, it can do so only when both hauls are within the limits of the state. Nothing in the section makes such limitation. Nothing in the federal constitution, in terms, at least, restricts the power of the state in this respect over its internal commerce. This question may arise under either of two conditions, one in which Congress has prescribed the interstate rate, and the other in which it has left the matter to be fixed by the carrier.

“Considering the first of these conditions, suppose Congress, in the exercise of its power over interstate commerce, should enact that all interstate passengers be charged exactly four cents a mile, and the railroad company, while obeying that statute in its charges for carrying passengers from Nashville to Louisville, should from Franklin to Louisville charge five cents a mile, could it be pretended that the prohibition of the state constitution against charging more for a short haul than for a long haul was not operative because an interference with interstate commerce? Has the state no power to compel its corporations to give to parties traveling within its limits the same rates and privileges that Congress prescribes for interstate passengers? And can it not do so by simply prohibiting a greater charge for a long than a short haul clause? In other words, is it interfering with interstate commerce when the state, not prescribing the charges for interstate travel, simply requires that the passenger shall be charged no higher rates for local travel?”

In conclusion the learned justice said: “That a state legislature has full power over local rates, subject only to the restriction that it cannot require a carrier to carry without reasonable compensation,

and that when it legislates for local rates alone it may fix those rates by figures, or upon the basis of any standard which it sees fit to adopt, and the mere fact that it bases them upon some standard is not legislation regulating that standard—the local rates are alone the matter regulated. For these reasons I cannot concur in the opinion and judgment.”

AITKEN, SON & CO. v. LANG.

[106 Ky. 652, 51 S. W. 154.]

GUARANTY—Revocation by Death.—A continuing guaranty, revocable at the will of the guarantor, is revoked by his death, without notice thereof to the guarantee. (p. 266.)

G. Bell, for the appellant.

Kohn, Baird & Spindle, for the appellee.

653 PAYNTER, J. To guarantee the appellants, Aitken, Son & Co., for goods which they might sell Miss Emma Lang, S. C. Lang executed and delivered to them a writing, which reads as follows:

“New York, March 15, 1895.

“Messrs. Aitken, Son & Co.

“Dear Sirs: In consideration of the sale by you to Miss Emma Lang, doing business under the firm name of Mme. F. Lang, at Louisville, Kentucky, of certain goods now or hereafter to be bought by her, and for one dollar to me paid, the receipt whereof is hereby acknowledged, I hereby guaranty the payment by her to you of the price of such goods; and, if she does not pay the same when due, I agree to promptly pay said price on demand.

[Signed] “S. C. LANG.”

On August 17, 1895, S. C. Lang died. For all the goods which the appellants sold Miss Lang previous to that date she paid. The goods for which the appellants seek to hold the Lang estate liable were sold in September and November **654** following his death. Assuming the averments of the appellants in the pleadings to be true, at the time the sales were made, in September and November, they were not aware of the death of S. C. Lang.

We understand counsel to agree that the writing which is the basis of this suit was continuing in its nature, unlimited as to time, and was to cover future sales made to Miss Lang.

The question is, What effect upon the guaranty had the death of the guarantor, with reference to sales of goods after his death, the guarantees acting without notice? It is insisted by counsel for appellants that it is an executed contract, and therefore the death of the guarantor did not revoke it, whilst counsel for appellees contend it is an open, continuing offer—a unilateral, executory, severable contract—subject to withdrawal before acted upon, and, that, therefore, the death of the party was a revocation of it. There is a conflict of authorities upon the question involved. Those which hold such a guaranty is not revoked by death reach the conclusion that the relations created by the guaranty between guarantor and guarantee is that of parties to an executed contract, whilst those who hold to the opposing view conclude the relationship to be that of a continuing offer for a contract. The guaranty declared upon is not limited as to time, nor does it limit the quantity of goods to be sold. It is continuing in its nature. The guarantees were not obligated by its terms to sell goods to Miss Lang upon the credit of the guarantor. It was a unilateral contract, which could be terminated at the pleasure of the guarantor. It is of a severable character, because if the guarantees sold goods upon the faith of it, the guarantor was bound to pay for such goods as had been sold upon his credit, but the guarantees could no longer sell goods upon his credit if their ⁶⁵⁵ authority to do so had been revoked. A guaranty of the kind under consideration, in effect, is an offer by the guarantor to pay the guarantees for such goods as they might sell the purchaser named. It is somewhat in the nature of an offer by the guarantor to the guarantees for a contract, for no contract is consummated—no consideration passing—until the goods are sold. Therefore, it cannot be said it is an executed contract, with reference to the future. It is wanting in one of the essential elements of a contract—mutuality. No obligation is imposed on the guarantees.

The guaranty could only continue during the will of the guarantor, as he could revoke it. Its continuing quality being terminable at the will of the guarantor, is it not unreasonable to suppose that it was intended by the parties that when the power to terminate ceased, by death, it was to continue until notice of death was in some way given the guarantees? This notice might not be received for a long time, as the real and personal representatives of the deceased might be ig-

norant of the guaranty, and in the meantime the estate might be bankrupted. In our opinion, as the guaranty was terminable at the will of the guarantor, when that will no longer existed, by reason of death, it was thereby revoked. It would not be profitable to review the authorities upon the question here involved, as the case of *Jordan v. Dobbins*, 122 Mass. 168, 23 Am. Rep. 305, is a well-considered case, and sustains the conclusion we have reached. We quote from it as follows: "An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the ⁶⁵⁶ guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

"The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that, if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which cannot be rescinded except by mutual consent. Thus, such a guaranty is revocable by the guarantor at any time before it is acted upon.

"In *Offord v. Davies*, 12 Com. B., N. S., 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted; and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal, which might be revoked at any time before it was acted on.

"Such being the nature of a guaranty, we are of the opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held

for a liability which ⁶⁵⁷ is created after his death, by the exercise of a power or authority which he might at any time revoke.

"Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is, in its nature, nothing more than a simple guaranty for a proposed sale of goods. The provision that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases affects the mode in which the guarantor might exercise his right to revoke it, but it cannot prevent its revocation by his death. The fact that the instrument is under seal cannot change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterward.

"We are not impressed with the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

"The decision in *Bradbury v. Morgan*, 1 Hurl. & C. 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory, and inconsistent with the opinion of the same court, a year before in *Westhead v. Sproson*, 6 Hurl. & N. 728, and with the decision in *Offord v. Davies*, 12 Com. B., N. S., 748, at the argument of which *Bradbury v. Morgan*, 1 Hurl. & C. 249, was cited; and it has not since been treated as settling the law of England: *Harriss v. Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. 866. The reasons of the similar decision in *Bank of South Carolina v. Knotts*, 10 Rich. 543, 70 Am. Dec. 234, are open to the same objections." 2 *Parsons on Contracts*, eighth edition, page 31, in a note says: ⁶⁵⁸ "A continuing guaranty contemplates a series of transactions. As each takes place, a separate obligation arises as to that, and to that extent what was a revocable offer becomes an irrevocable contract. As to the future, however, death or notice may revoke it."

It is said in *Pollock's Principles of Contracts*, page 21: "There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the

proposed agreement impossible, by removing one of the persons whose consent would make it."

It is said in 1 Brandt on Suretyship and Guaranty, second edition, section 134: "It has been held that the death of a person who has given a letter of credit authorizing another to draw on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on his credit so as to bind his estate, though the person to whom and for whose security the letter was given has no notice of his death, and the period for which the authority was given has not expired."

We believe it is but the recognition of a just and sound principle to hold that the death of the guarantor revokes a guaranty like the one under consideration. The duty should be imposed upon one who attempts to sell goods upon the credit of another to ascertain that such one is living at the time of the sale. Slight diligence will always enable him to acquire such information, and it certainly works no hardship upon him to be required to do so. The judgment is affirmed.

A Contract of Guaranty is, as a rule, not terminated by the death of the guarantor: See the monographic note to Chamberlain v. Dunlop, 22 Am. St. Rep. 814. As to when the contract is limited to the life of the beneficiary, see Rotch v. French, 176 Mass. 1, 79 Am. St. Rep. 292, 56 N. E. 893.

BRIDGES v. McALISTER.

[106 Ky. 791, 51 S. W. 603.]

JUDGMENTS—Effect of Reversal on Acts Done.—A judgment, though subsequently reversed, for error, furnishes full protection for all acts done in enforcing it, prior to its reversal. (p. 270.)

JUDGMENTS—Principal and Agent.—A judgment against an agent requiring a ditch to be filled binds his principal, so that, upon a reversal of such judgment, he cannot recover damages for injury to his property resulting from the filling of the ditch, in obedience to the judgment, prior to its reversal. (p. 273.)

JUDGMENTS—Estoppel.—The estoppel of a judgment is always mutual, and if it binds one of the parties so as to prevent him from showing the truth, it also estops the other. (p. 273.)

JUDGMENTS—Res Judicata.—A question not in issue, though passed upon in the opinion in a former appeal, is not res judicata.

on a subsequent trial or appeal, where the issue is properly made by the pleadings filed after the first appeal. (p. 274.)

G. W. Jolly, H. Jolly, and R. G. Hill, for the appellants.

Sweeney, Ellis & Sweeney and Walker & Slack, for the appellee.

793 HOBSON, J. Appellants and appellee own neighboring farms. Between their lands there was a ridge, which prevented the water falling on appellee's land from flowing down naturally over appellants' land. Both farms lie in a very level section, where there is difficulty about drainage. Some years ago the owners of the land above the ridge and some of those below united in an undertaking to cut a ditch in a southerly direction, through the ridge, to Panther creek, **794** for the purpose of draining all their land. The ditch was cut through the ridge, but for want of means to complete it there stopped. The result of this was that the lands above the ridge were drained and the lands below were flooded by water that did not by nature flow upon them. The work on the ditch was abandoned. It caved in. Trees and other things fell in it, until in many places it was nearly filled up. The owners of land above the ridge after some years employed William Miller to clean it out, and, he having begun to do so, appellants and others, owning land below the ridge, filed suit against him for the purpose of enjoining him from cleaning out the ditch. On the hearing of this case the circuit court entered a mandatory order requiring the ditch to be filled up so that no water could pass over the ridge that did not flow over it naturally. On appeal from this judgment to this court it was held that the injunction should have prohibited the appellant from cleaning out the ditch, or from reconstructing it in any way so as to increase the flow of water on the land below it, and that it was error to require the ditch to be filled up: See *Miller v. Hayden*, 91 Ky. 215, 15 S. W. 243. On the return of the cause a judgment was entered in that action pursuant to the mandate of this court. This was something over two years after the entry of the original judgment requiring the ditch to be filled up. There had been no supersedeas of that judgment, and, in obedience to it, the ditch had been filled up as therein required. By reason of the filling up of the ditch under the judgment, the water which had passed through it from appellee's land could no longer escape in this way, and was thrown back on it. After

the ditch had been opened to the extent indicated by the judgment entered in obedience of the opinion of this court, appellee brought this suit for damages to ⁷⁹⁵ his land from the closing of the ditch for the two years it had remained stopped up under the judgment. Appellants pleaded, in defense of the action, that the ditch had been stopped up in obedience to the order of the court, and relied upon that judgment as a protection to them for damages sustained by reason of what was done in obedience to it, there being no supersedeas. They did not allege, however, that appellee was party or privy to the case in which the judgment was rendered, and the court sustained a demurrer to this plea. There was then a trial and verdict for defendants, which, on appeal to this court, was set aside, the opinion of this court pointing out that the judgment pleaded was no bar, because it was not averred that appellee was party or privy to that action: *McCallister v. Bridges*, 19 Ky. Law Rep. 107, 40 S. W. 70. There was no cross-appeal in that case, and from the nature of the case there could be none; so the only question before the court was whether there had been a fair trial before the jury. Nothing more was considered or decided.

On the return of the case the defendant tendered an amended answer, in which he set out that Miller, while cleaning out the ditch, was acting as the agent and servant of appellee, McAlister; that appellee, with others, employed him to dig the ditch, and knew of the suit, testified in it as a witness, and that Miller was only their agent in the transaction. The court below refused to allow the amended answer to be filed, holding, in effect, that the judgment was no protection as to acts done under it, though not superseded. There was then another trial, resulting in a verdict for one thousand dollars in favor of appellee.

The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not superseded. ⁷⁹⁶ In *Freeman on Judgments*, section 482, it is said: "But a subsisting judgment, though afterward reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant be taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment."

And in section 104b the same author says: "The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decisions of the court."

The same principles are laid down in *Black on Judgments*, sections 170, 355. In *Kaye v. Kean*, 18 B. Mon. 847, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed. The court said: "The judgment of the circuit court was not void, but merely erroneous. . . . So long, therefore, as the judgment remained in force unsuspended and unreversed, it was the duty of the appellant to have rendered obedience to it. His contumacy subjected him to be proceeded against for a contempt, and as, therefore, there was sufficient cause for his imprisonment, he cannot maintain an action therefor against the appellee."

⁷⁹⁷ In *Clark v. Rhodes*, 2 Bush, 16, again this court said: "A judgment is a final and conclusive determination of the rights of the parties to the litigation, and until it shall be reversed, vacated, or modified in some one of the modes provided by law the parties cannot refuse to obey it; nor can they, by subsequent litigation, indemnify themselves against its legal consequences."

In *Fraser v. Page*, 82 Ky. 73, an executor who had paid out a fund under a judgment which was not superseded, and afterward reversed, was held protected by it for acts done in obedience to it while in force. The same ruling was made in *McKee v. Smith*, 5 Ky. Law Rep. 224; *Shultz v. Beatty*, 6 Ky. Law Rep. 662; *Showalter v. Simmons*, 5 Ky. Law Rep. 423; *Dudley v. Beatty*, 5 Ky. Law Rep. 773.

These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancellor in entering the judgment in the case referred to did not act as the agent of either of the parties. The judgment was the act of the law. Neither party could control the court, and neither was responsible for his actions. The law constituted a tribunal to determine the rights of the parties.

That determination, proceeding from a power above them, was in no sense their act. A litigant in this court does not procure the judgment entered in any such sense as to render him responsible for the consequence of the judgment, or its reversal by the United States supreme court. We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for a tort. The fact that there are no precedents for such recovery seems at this day conclusive that it has not ⁷⁹⁸ been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of *Hays v. Griffith*, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306, is not supported by the weight of authority, and cannot, in our judgment, be maintained on principle, so far as it lays down a greater liability. The quotation made from *Freeman on Judgments* is from a sentence omitted altogether in the last edition. The opinion is supported only by some cases in Illinois and California, and is contrary to the rule followed by the United States supreme court and all the other state courts, so far as we have seen. It is also in conflict with the well-settled rule that the court, in ordering or confirming a judicial sale, and the commissioner, in making it, do not act as the agent of the plaintiff: *Bank of United States v. Bank of Washington*, 6 Pet. 9; *Rorer on Judicial Sales*, secs. 1-12; *Foreman v. Hunt*, 3 Dana, 621.

Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years, and it would often produce intolerable hardship to hold a litigant responsible for the consequences of an erroneous judgment under such circumstances. The object in having trust estates, including those of decedents, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund upon a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation.

799 Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the curia or court, because it was held by the king himself originally. The judgments of the court read as the judgments of the king, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly, there the subject was not responsible for damages for the act of the king. In this country the power vested in the king vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to their judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts, and maintain respect for their judgments; and when, in doing this, he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom.

The case of *Hays v. Griffith*, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306, is disapproved so far as it may be construed to lay down a different rule.

It remains to determine whether appellee was bound by the original judgment while it was in force.

In *Freeman on Judgments*, section 174, the rule is thus stated: "Neither the benefits of judgments on the one side nor the obligations on the other are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important ⁸⁰⁰ class of persons who, being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among those are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person."

In *Herman on Estoppel and Res Adjudicata*, sections 150-152, it is said: "One who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest, although his name does not appear therein.

"A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former,

and a judgment is an estoppel to a renewal of the principal or master in the suit on the ground that he is considered the real party, and especially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other.

"In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."

These conclusions are sustained by *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627; *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44; *Robbins v. City of Chicago*, 4 Wall. 672—where many other authorities are collected. This subject was fully considered by this court in the case of *Schmidt v. Louisville etc. R. R. Co.*, 99 Ky. 143, 35 S. W. 135, 36 S. W. 168, ⁸⁰¹ and under the principles settled in that opinion, and in the previous case of *Warfield v. Davis*, 14 B. Mon. 40, appellee was clearly bound by the judgment against his agent, Miller, in the original action. That action was clearly brought to settle the rights of the parties. It has since been recognized by them as settling their rights. Appellee brought no suit for damages for the filling up of the ditch until that judgment was reversed, and it may be safely assumed that he would not have sued at all if that judgment had been affirmed. The action has proceeded upon the assumption of both parties that the judgment in that case finally settled their rights, and that appellant could not relitigate here the right to stop up the ditch entirely, which was determined against him there. But the estoppel of a judgment is always mutual. If it binds one of the parties, so as to prevent him from showing the truth, it also estops the other. If the judgment referred to did not bind appellee until reversed, then it constituted no estoppel upon appellant in this action, and he might have shown all the facts, and had the jury pass on the question of fact determined there. Appellee has not proceeded with his case upon this theory, but both parties have recognized the judgment in the equity case as settling finally their rights in the ditch. This was, we think, a correct view of the law. The judgment finally rendered in that action is conclusive on both parties as to the right to maintain the ditch; and the chancellor's judg-

ment, until reversed, was equally conclusive, and, not having been superseded, neither can maintain an action against the other for acts done in obedience to it while it was in force.

This question was not before the court on the last appeal of the case, and what was said then must be taken in reference to what was before ⁸⁰² the court. There was no plea, then, of any facts showing that appellee was party privy to the judgment relied on in bar, or bound thereby in any way. These facts having been pleaded on the return of the case, the question is now before the court for the first time. Then there had been a verdict for the defendant. There was no cross-appeal, and could be none, and the only question was whether there had been a fair trial under the issues presented.

The rule is well settled that a question not in issue, though passed upon in the opinion on a prior appeal, is not *res judicata* on a subsequent appeal, where the issue was properly made by pleadings filed after the first appeal: See note to *City of Hastings v. Foxworthy*, 34 L. R. A. 344, and cases cited. Thus in *O'Brien v. Commonwealth*, 6 Bush, 563, it was held that a discharge of a juror after the jury was sworn, without the defendant's consent, did not operate to acquit him. But when this opinion was rendered there had been no plea of former jeopardy. On the return of the cause to the lower court the defendant put in this plea, and, having been again convicted on a second appeal, the former opinion was held not to include the question, and the defendant was discharged: *O'Brien v. Commonwealth*, 9 Bush, 333, 15 Am. Rep. 715. This rule has the intorsement of the United States supreme court, and seems to us sound, and necessary to the proper administration of justice: *Barney v. Winona etc. R. R. Co.*, 117 U. S. 228, 6 Sup. Ct. Rep. 654.

The judgment complained of is therefore reversed, and cause remanded, with directions to the court below to grant appellant a new trial, to allow the amended answer "xx-1" and "x-1" and "x-2" to be filed, and for further proceedings not inconsistent with this opinion.

Res Judicata.—A judgment is binding between the parties and all persons who are represented by them and claim under them, or who are in privity with them: *Ablers v. Thomas*, 24 Nev. 407, 77 Am. St. Rep. 870, 56 Pac. 93; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388. As to who are parties and privies, see *Walker v. Philadelphia*, 195 Pa. St. 168, 78 Am. St. Rep. 801, 45 Atl. 657; note to *Hill v. Bain*, 2 Am. St. Rep. 876-878. It has been held

that a former judgment in trespass against the defendant's principal may be pleaded in bar of an action against the defendant, as agent, for the same acts: *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627. See, also, the monographic note to *Charles v. Hoskins*, 83 Am. Dec. 387.

The Effect of the Reversal of a Judgment on acts done under it is considered in *Teasdale v. Stoller*, 133 Mo. 645, 54 Am. St. Rep. 703, 34 S. W. 873; *Parker v. Courtney*, 28 Neb. 605, 26 Am. St. Rep. 360, 44 N. W. 863; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628; *Peck v. McLean*, 36 Minn. 228, 1 Am. St. Rep. 665, 30 N. W. 759; note to *Little v. Bunce*, 28 Am. Dec. 368-372.

COOPER v. COMMONWEALTH.

[106 Ky. 909, 51 S. W. 789.]

RES JUDICATA—Judgments in Criminal Cases.—A judgment acquitting the accused under an indictment for adultery is conclusive in his favor on his trial for perjury committed on the first trial by which his acquittal was secured. (p. 276.)

JUDGMENT in Criminal Cases.—Acquittal of Charge of Misdemeanor is a Bar to prosecution for perjury of the accused in securing such acquittal. (p. 276.)

A. T. Wood and R. Blair, for the appellant.

910 **BURNHAM, J.** The appellant and one Libbie Purvis were jointly indicted in the Rowan circuit court for the offense of adultery. The trial under that indictment resulted in a verdict of acquittal for appellant. The grand jury of Rowan county thereupon reported this indictment against him, in which it is charged that upon the trial of appellant and Libbie Purvis upon the charge of adultery "he did knowingly, willfully, and corruptly swear that he had not had carnal sexual intercourse with Libbie Purvis, when same was false and untrue, and was known by him to be false and untrue." The trial under this indictment resulted in a verdict of guilty, and a judgment sentencing appellant to confinement in the penitentiary, which we are asked upon this appeal to reverse.

The principal question to be considered is the effect which is to be given to the indictment, trial, verdict, and judgment of acquittal of appellant under the indictment for adultery, as it is manifest that appellant cannot be guilty in this case if he was innocent of the charge contained in the indictment.

His guilt or innocence of the offense of having had carnal sexual intercourse with Libbie Purvis was the exact question

which was tried in the first ⁹¹¹ proceeding, and as a result of that trial the defendant was found not guilty. In order to convict him in this case, it was necessary for the jury to believe that he was guilty of the identical offense for which he had been tried and acquitted under the other indictment, as it is evident that, if he was innocent of having had carnal sexual intercourse with Libbie Purvis, he was not guilty of false swearing when he stated that he had not had such intercourse with her. We therefore have, as a result of the trial of appellant under these two indictments, a verdict and judgment finding him not guilty of the offense of having had carnal sexual intercourse with Libbie Purvis, and in the second case a verdict and judgment finding him guilty of false swearing when he testified that he had not had such intercourse with her; in other words, the first jury found him innocent of the misdemeanor with which he was charged, and the second jury found him guilty of a felony because he testified that he was not guilty of such misdemeanor. It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results. It appears to us from the conflicting character of the testimony in the case upon the question of defendant's guilt or innocence that a verdict of the jury might have been upheld in the first case whether it found one way or the other, but certainly the finding of the jury must be conclusive of the fact considered as against the commonwealth, and preclude any further prosecution which involves the ascertainment of such fact.

A question analogous to the one at bar was considered in the case of Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. Rep. 437, the facts in which case are about as follows: Coffey was a distiller, and was proceeded against under a section of the statute ⁹¹² for defrauding, or attempting to defraud, the United States of the tax on spirits distilled by him, and the copper stills and other distillery apparatuses used by him and the distilled spirits found on his distillery premises were seized. One section of the statute provides, as a consequence of the commission of the prohibited act, that this certain property should be forfeited, and that the offender should be fined and imprisoned. Coffey was first proceeded against on the criminal charge, and acquitted. Subsequently, a proceeding to enforce the forfeiture against the res was instituted. The defendant in the proceeding in rem relied upon his acquittal

under the criminal charge, and Judge Blatchford, in delivering the opinion of the court, said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless, the fact or act has been put in issue, and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it." ⁹¹³ And the conclusion reached in that case is in consonance with principles laid down by the United States supreme court in the case of *Gelston v. Hoyt*, 3 Wheat. 246.

In the case of *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 538, the court held: "The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court."

And in the case of *United States v. McKee*, 4 Dill. 128, Fed. Cas. No. 15,688, the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterward sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged transactions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

And Judge Van Fleet, in his Treatise on the Law of Former Adjudication, page 1242, section 628, says: "If there is a contest between the state and the defendant in a criminal case over an issue, I know of no reason why it is not *res judicata* in another criminal case"; citing a number of American decisions in support of the text.

Appellant in this case had already been tried and acquitted of the offense of having had carnal ⁹¹⁴ sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the Commonwealth, and he cannot again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation. It therefore follows that appellant was entitled to a peremptory instruction to the jury to find him not guilty.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

Mr. Justice Paynter concurred in a dissenting opinion by Mr. Justice Holson, in which the latter said:

"In Freeman on Judgments, section 318, it is said: 'The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction, under an indictment for any offense, is a bar to any subsequent indictment substantially like the former. But in criminal as in civil actions, it is essential that the judgment be on the merits, and not tainted with fraud. Thus going into a favorable court, and submitting to a conviction, in order to escape a severe penalty, is no bar to a bona fide prosecution.'

"On the same principle, foreign judgments may be avoided for fraud in their obtention, for the reason that there is no other way to correct the matter, and that the ends of justice require this: Freeman on Judgments, sec. 591.

"In a criminal case the state cannot obtain a new trial for newly discovered testimony after the term, and if the judgment bars a prosecution of the defendant for his willful perjury, whereby he obtains it, there is no remedy. The ends of justice have not only been defeated, but the foundations of judicial proceedings have been sapped.

"The rule stated by Mr. Freeman above that a judgment rendered in an inferior court to which the defendant voluntarily goes to escape a severer penalty is not a bar to a subsequent prosecution for the same offense, rests on the ground that he thus perpetrates a fraud on the state, and has been followed by this court in *Carlington v. Commonwealth*, 78 Ky. 83. The fraud in this class of

cases is in giving the court jurisdiction; but certainly fraud of this sort is less tolerated in the eye of the law than the abhorred crime of perjury, cheating the court out of the truth, after its jurisdiction has lawfully attached.

"In *State v. Swepson*, 79 N. C. 632, the defendant had, by imposition on the court, had a jury impaneled and a formal verdict of not guilty entered, on the ground that the matter had been compromised with the state. This was held no bar to another trial under the same or another indictment. The court said: 'The state ought to have some remedy. Guilt cannot be allowed to protect itself by fraud and corruption, or else the tribunals of justice become dens of thieves, and law as administered in them is a machine to punish the weak and screen the powerful. . . . There is a remedy not without precedent or authority for its use, plain, and not of infrequent use, laid down in the elementary works on law, and supported by the adjudications of respectable courts. This remedy is in the court in which the trial was had, and is independent of any action of this court. It is asserted in many text-books and dicta of judges and supported by some decisions, that a verdict of acquittal on an indictment for a misdemeanor procured by the trick or fraud of the defendant, is a nullity, and may be treated as such; and the person acquitted by such means may be tried again for the offense of which he was acquitted: 3 Greenleaf on Evidence, sec. 38; 1 Wharton's Criminal Law, sec. 546; 3 Wharton's Criminal Law, sec. 3221, 3222; 1 Chitty's Criminal Law, 657.'

"If the defendant, where his constitutional right not to be put in jeopardy a second time for the same offense is not involved, may be estopped, by reason of his own fraud in procuring the judgment, from relying on the plea of *res adjudicata*, how much the more should he be estopped to make this plea to escape punishment for the crime of perjury by means of which he obtained the judgment. There is not a shadow of doubt of appellant's guilt in the case before us, and not to punish him is to lose sight of the principles on which the rule relied on rests."

Former Adjudication.—Where by collusion or fraud a party procures himself to be prosecuted for a crime, he cannot avail himself of a conviction or acquittal in that action as a bar to a subsequent prosecution for the same offense: See the monographic note to *State v. Solomons*, 27 Am. Dec. 477; *De Bord v. People*, 27 Colo. 377, 83 Am. St. Rep. 89, 61 Pac. 599.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE v. BOLDEN.

[107 La. 116, 31 South. 393.]

STATUTES—Construction of.—A statute making it a crime to shoot a person with intent to kill, without making reference to specific intent, must be construed with reference to legal principles, and so as not to cut off the right of self-defense. (p. 281.)

CONSTITUTIONAL LAW—Reasonableness of Statute.—A statute, though unreasonable cannot be declared invalid unless in conflict with constitutional provisions. (p. 282.)

STATUTES—Interpretation.—The Title of an Act may be taken in connection with its other parts to assist in removing ambiguities, if the intent is not plain. (p. 282.)

STATUTES.—A Title of an Act which serves to indicate its object cannot be said to have misled the legislature at the time when it was adopted. (p. 283.)

JURY TRIAL.—Verdict “That we, the jury, find the accused guilty of shooting with intent to kill,” without specially mentioning the name of the accused, is a good and sufficient verdict. (p. 283.)

W. Guion, attorney general, W. A. Wilkinson, district attorney, and L. Guion, for the appellant.

Scarborough & Carver, for the appellee.

117 BREAUX, J. Defendant was indicted for shooting Sam Cook with intent to kill and murder, under section 791 of the Revised Statutes as amended by Statute 43 of 1890. He stood his trial and the jury found him guilty of shooting with intent to kill, under Act 44 of 1890. The defendant interposed a motion in arrest of judgment, which was sustained. The state appeals.

The motion sets forth six grounds, only two of which were argued in the brief and at the bar—the third and sixth. They present the defense urged here. The first proposition in order of the argument is that Act 44 of 1890 is unconstitutional and the other that the verdict finds no crime. Learned counsel for the accused points to the fact that the title of Act 44 of 1890 makes it a crime to “willfully” shoot any person with intent to kill, while this word is not contained in the body of the act, but makes it a crime to shoot any person with intent to kill, whether, ¹¹⁸ counsel contends, the shooting is done willfully or not. Counsel further contends that this cuts off the law of self-defense and that under this act one may be found guilty who has committed no offense for which he should be punished; that the legislature did not intend to cut off the law of self-defense, and that it is evidence that they were misled by the title of the statute.

The unconstitutionality urged presents a serious issue for our consideration. The objection is, in substance, we take it, that the law in question is unreasonable and leads to an absurd consequence; that it makes an act a crime without reference to a specific intent. We can only say in answer that such acts have heretofore been adopted and been enforced. But the illegality charged lends itself readily to argument in support of the theory of unreasonableness and absurdity and to striking and harrowing illustrations of possible wrongs and oppressions. The argument is not unanswerable. It has been again and again answered and it has been held that the statute should be so construed as not to sanction an injustice and a wrong or a consequence utterly absurd. We must presume that the legislature did not intend that the law should be so construed without reference to established principles. The reason of the law is to be consulted and not exclusively the cold letter.

In *State v. Riley*, 49 La. Ann. 1619, 22 South. 843, we quoted from the text of Cooley, which we thought conclusive. For the sake of some brevity we do not reinsert the excerpt here. The language of Mr. Justice Field, in *United States v. Kirby*, 7 Wall. 482, may well be repeated. There are cases in which the reason of the law should prevail over its letter.

“The common sense of man approves the judgment mentioned by Puffendorf that the Bolognian law which enacted that whoever drew blood in the streets should be punished with the utmost severity, did not extend to the surgeon who

opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden that the Statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, for he is not to be hanged because he would not stay to be burnt."

In the decision from which we quote the foregoing, a mail carrier was arrested by a state officer on an indictment for murder. The act committed, it seems, came within the letter of the law. When the acts ¹¹⁹ which create the obstructions are in themselves unlawful, the intention, the court said, to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves from the execution of which a temporary delay to the mails unavoidably followed. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence." Applying that rule here, the statute attacked does not make an offense that which is lawful or innocent.

In the well-considered case of *People v. Mahaney*, 13 Mich. 501, the attack was made because it violated fundamental principles. The court said: "An unbroken series of decisions has settled the rule of law that before we can declare an act of the legislature invalid, its provisions must be found to conflict with the constitution"; citing a number of decisions. See among the number another well-reasoned opinion, *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68.

We have, to this point, considered the attack upon grounds most favorable to the defendant. We have conceded for the discussion that, perhaps, the law does lead to unreasonableness or absurdity. We are by no means convinced that this is the correct view. The enactment, taken as a whole, shows that it was not the intention to denounce an act in general terms without the least reference to a criminal intention. The title may be consulted as relates to intent. In England the doctrine holds that the title of an act is not part of it because added by the clerk of parliament, but this is not controlling when the legislature make the title.

It was said by the supreme court of the United States in the case of *United States v. Fisher*, 2 Cranch, 358, that "the title of an act, when taken in connection with its other parts, may

assist in removing ambiguities where the intent is not plain; for where the mind labors to discover the intention of the legislature, it seizes everything, even the title, from which aid can be derived."

The supreme court of Ohio, in *Lessee of Burgett v. Burgett*, 1 Ohio, 469, 13 Am. Dec. 634, said: "The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. The purpose of our statute appears from its title to be the prosecution of frauds and perjury, and although it is said that the title forms no part of the act (1 Ld. Raym. 77), yet the reason of this dictum appears to be the practice of parliament by which the ¹²⁰ title is prefixed to the statute at the discretion of the clerk of the house in which the bill originated, but such is not the practice with us. The title is framed in the same manner as the bill and is sanctioned by the vote of both branches of the legislature. We may, therefore, consider it as explanatory of the object of the law."

With us every law shall embrace one object and that shall be expressed in the title: Const., art. 31. In that view the title has an importance which it would not have if the law were entirely silent upon the subject. The title in this state is always considered, to some extent, as part of the statute. It is plain that no one innocent could be made to suffer penalty in the presence of a title which announces that the law's object is to make that a crime which a person has committed willfully. But it is further contended that the legislature was misled by the title. The statute has not heretofore in any of the cases been attacked upon this ground. Read with the statute, as one assisting the other, there is no reason in our view, to infer that the legislature was misled.

The next ground of defendant's objection is that the verdict finds no crime. The verdict reads: "We, the jury, find the accused guilty of shooting with intent to kill." In a case recently handed down we had occasion to consider a similar verdict. We reached the conclusion that it was a good verdict, and affirmed the sentence. We have found no good reason to change our views as expressed in that case: *State v. Broussard*, 107 La. 189, 31 South. 637.

Defendant's contention also is that the verdict does not find that "any person was shot," and that the accused should have been named in the return as the one found guilty. We deem it answer enough to say that the verdict is sufficiently complete without special mention of the names of the accused.

The crime with which defendant is charged is distinguished into degrees. Statute of 1890, section 791 of the Revised Statutes, and Statute 44 of the same session, denounce different degrees of a crime. We take it that the crime being distinguished in degrees, the jury may find the degree of which the defendant is guilty of shooting with intent to kill under the last statute, without setting forth the name of the accused.

It is therefore ordered, adjudged, and decreed that the judgment of the court sustaining the motion in arrest of judgment be annulled, avoided, and reversed.

¹²¹ It is further ordered, adjudged and decreed that the case be reinstated on the docket of the court, the motion in arrest of judgment overruled, and that the case be proceeded with from that point in accordance with law and the views before expressed.

Rehearing refused.

In Construing a Statute, resort may be had, in cases of doubt and obscurity, to the title of the act: *Cohn v. People*, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. 60; *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296, 34 Pac. 722; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. 692.

Constitutional Law.—Apart from limitations imposed by the constitution, the power of the legislature has no bounds: *Sheppard v. Dowling*, 127 Ala. 1, 85 Am. St. Rep. 68, 28 South. 791. A statute can be held unconstitutional only when clearly violative of the organic law: *State v. Hay*, 126 N. C. 999, 78 Am. St. Rep. 691, 35 S. E. 459. Neither the wisdom, expediency, nor justice of a statute is a matter for discussion in passing upon its constitutionality: *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277, 45 N. E. 830; *Townsend v. State*, 147 Ind. 624, 62 Am. St. Rep. 477, 47 N. E. 19; *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 69 Am. St. Rep. 321, 53 N. E. 68; *State v. Schlitz Brew. Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

The Sufficiency of the Title to Statutes is discussed in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486; *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

MARKS v. NEW ORLEANS COLD STORAGE COMPANY.

[107 La. 172, 31 South. 671.]

COLD STORAGE COMPANIES—Liability.—It is not necessary, in order to recover for damage to goods in cold storage, to prove more than that the goods when delivered to the company storing them were, according to the usual and ordinary test of commerce sound. (p. 286.)

EVIDENCE.—Witnesses Interested in the matter in suit are competent, and their testimony is binding on the court, unless overcome by counter-testimony, or irreconcilable with the known facts. (p. 286.)

COLD STORAGE COMPANIES Have a Right to Hold Possession of goods stored until the storage charges are paid. (p. 288.)

COLD STORAGE.—Charges for cold storage cannot be compensated by the storer's unliquidated claim for damages. (p. 288.)

COLD STORAGE—Limitation of Liability.—Although a cold storage receipt issued for goods received contains a printed limited liability clause, to the effect that the storer will not be liable for the "contents or damage to goods," he is not thereby relieved of his obligation to preserve the goods in the condition in which they were when received. (p. 289.)

COLD STORAGE—Limitation of Liability.—A cold storage company may, by contract, limit its liability, and a person who signs such contract will be bound by its terms, but the waiver must be express and to the full extent intended. (p. 292.)

EVIDENCE.—Letters admitted in evidence without objection may be taken as the beginning of proof of a certain fact. (p. 292.)

WAREHOUSEMAN—Receipts—Storage Charges.—The holder of a warehouse receipt is entitled to delivery of the property stored upon tender of payment of storage charges upon the property, and payment of charges on other property of the owner cannot be required before delivery of that for which the charges have been tendered in due form. (p. 293.)

COLD STORAGE Charges on Damaged Goods for which the storer is made to pay may be recovered by him. (p. 294.)

W. S. Parkerson, for the appellant.

McCloskey & Benedict, for the appellee.

173 PROVOSTY, J. Having on hand large quantities of cow-peas, and June coming on, when cow-peas are in danger of being damaged by weevils in the climate of New Orleans, the plaintiffs separated the mixed peas from the straight clay peas and put the latter, the more valuable, in the cold storage warehouse of the defendant company for preservation until the opening of the next season—say March following. The quantity thus stored was 13,028 sacks, and the transfer to the cold storage was effected between the 9th and the 18th of June.

Afterward, a few days more than a month afterward, between the 19th and 30th of July, plaintiffs transferred to the same cold storage what they still had on hand of the mixed peas—namely, 2,099 sacks. In the course of the following season, plaintiffs withdrew the peas from the cold storage as the requirements of their trade demanded, until the defendant refused to make further deliveries, claiming the right to hold the peas for unpaid storage, and thereupon the plaintiffs immediately brought the present suit. This was in July, 1898, a year after the peas had been stored.

Plaintiffs allege that of the peas withdrawn 642 sacks were damaged, and had to be sold for \$433.19 instead of \$1,249.96, the regular price; and that defendant owes them the difference, viz., \$816.77, the damage having come about through its fault. And they allege, further, that the defendant refuses to deliver to them the remainder of the 13,028 sacks of peas—namely, 1,250 sacks; that the same are damaged to such an ¹⁷⁴ extent as to have lost all value; that the damage came about through the fault of defendant, and that defendant owes the value, viz., \$2,458.33. And plaintiffs allege, further, that of the 2,099 sacks of peas defendant still holds and refuses to deliver 1,360 sacks, and owes the value, \$616.05. Plaintiffs do not say that these 1,360 sacks are in any worse condition than they were when put in cold storage.

The defendant denies that it has been in fault, avers its rights to detain the cow-peas until payment of the amount due for storage, and claims in reconvention the amount thus due—namely, \$1,896.65.

At the request of the plaintiffs the peas detained by defendant were sold by the sheriff soon after the institution of this suit. The 1,250 sacks sold for \$431.72, and the 1,360 sacks for \$198.98.

The business of the defendant is to preserve perishable articles by means of cold air. Articles received by defendant for preservation are supposed to be liable to undergo or to be actually undergoing a process of deterioration through the development in them of insect life, and the undertaking of defendant, for which it is paid more than quadruple the price of ordinary warehousing, is to prevent or arrest this process. In order to recover against the defendant, therefore, it is not necessary for plaintiffs to show that their goods were not affected by insect life when put in cold storage, or that the process of deterioration had not begun in said goods, but that said goods,

by the usual and ordinary tests of commerce, was classed as sound.

The two plaintiffs and Mr. McMillan testify positively and emphatically that they tested every sack of the peas, this test being made as the peas were being hauled to the cold storage, and found the peas to be perfectly sound. The interest of these witnesses detracts from the weight of their testimony. (Mr. McMillan has against the defendant a claim similar to that of the plaintiffs.) But the witnesses are three in number; they are by our law competent witnesses; they are business men of this city; and, after all allowances have been made, their testimony is binding on the court. The supposition of these witnesses having been mistaken is excluded by the fact that they were large dealers in peas, entirely competent to test the peas, and by the further fact that the testing of the soundness of a pea is a very simple matter; a sound pea being cold, and a weevily pea hot.

The superintendent of the cold storage testified to the machinery of the cold storage having run perfectly while the peas were in cold storage, and a large number of dealers in different kinds of perishable articles ¹⁷⁵ who had goods in the cold storage during the time that the peas of the plaintiffs were there testified to their goods having been properly preserved; and we have no doubt at all that the machinery of the cold storage was properly run.

The peas, then, having been sound when put in, and the machinery having run regularly, it must be that the damage to the peas occurred before the cold had penetrated sufficiently to arrest deterioration. If so, defendant is responsible; for it was its business to know what quantity of peas it could safely admit at one time into its cold storage.

This responsibility of the defendant, the superintendent of the cold storage, Mr. Scratchly, was alive to, for we find him cautious about letting in the peas too fast. "Saw Mr. Scratchly," says Mr. McMillan, "and asked him whether he couldn't take them a little more rapidly, as we wanted to get them in, and he said they were having a little difficulty with the temperature keeping it down to where it should be, and he would only take in a certain amount a day, as he didn't want to endanger the temperature of the warehouse."

We can explain the deterioration of the peas in no other way than by assuming that the superintendent was not cautious enough, and did "endanger" the temperature of his cold storage

by letting in the peas too fast or in too great quantities. The largest quantity the defendant had ever stored previously was from 6,000 to 7,000 sacks, whereas this time, in the brief space between the 9th and 18th of June, it undertook to accommodate 13,028 sacks for plaintiffs and 26,099 sacks for McMillan & Co. There is evidence that the peas were stored too much in a pile, and we must say this evidence is but very faintly contradicted by Mr. Scratchly. Of the 13,028 sacks of peas 5,422 were transferred into the cold storage directly from the cars that had brought them from Tennessee, and 7,606 were transferred from the warehouse of Holmes & Co., in this city. The peas transferred from the cars came out of the cold storage all sound. Defendant argues that, since all the peas from the cars came out sound, and the peas from the warehouse of Holmes & Co. came out damaged, it must be that not the cold storage but the warehouse is responsible for the damage. The argument, though possessing considerable force, is by no means conclusive. In the first place, not all the peas from the warehouse of Holmes & Co. came out of the cold storage damaged, but only some of them; 5,910 sacks came out sound; a ¹⁷⁶ larger amount than the total quantity that came from the cars. The peas from the warehouse of Holmes & Co., which had been subjected for sometime to the temperature of New Orleans, may have carried with them into the cold storage a greater quantity of heat than did the peas direct from Tennessee. Moreover they may have been stored less advantageously.

The loss resulting to the plaintiff from the deterioration of the 642 sacks of peas is not proved. As to these 642 sacks we must therefore nonsuit plaintiff.

The defendant had a right to hold possession of the peas until the storage was paid: Civ. Code, sec. 2956. The storage could not be compensated by the plaintiff's unliquidated claim for damages: Civ. Code, sec. 2209. Plaintiff can, therefore, recover nothing for the 1,360 sacks that were in a damaged condition, when put in the cold storage. It is not alleged that these 1,360 sacks deteriorated while in the warehouse of plaintiff; the only allegation is that defendant refused to deliver them up; and, since we have held that defendant properly so refused, we can allow the plaintiff nothing on this demand.

The price for which the peas were sold belongs to plaintiff, subject, however, to the pledge of the defendant to secure the amount due for storage.

Of the 1,250 sacks, 1,054 were damaged. These were sold at nineteen and one-half cents per bushel. Had they been sound they would have brought thirty-six and one-half cents per bushel. Plaintiff is entitled to recover from defendant the difference. There were 1,578 bushels, which, at seventeen cents per bushel, the difference between nineteen and one-half and thirty-six and one-half, amounts to \$268.26.

The sale made by the sheriff, having been made at the instance of the plaintiffs, was the act of the plaintiffs, for which the plaintiffs alone are responsible. This sale must be held to be the exact equivalent of a private sale made by the plaintiff. As such it measures the value of the peas at the time they were taken out of the cold storage and sold.

On the reconventional demand defendant is entitled to judgment as prayed, with recognition of the depository's pledge on the price of the peas sold by the sheriff.

The defendant was sued on its general liability as a cold storer, and it answered by a general denial. It did not plead any special contract. But we find that in the heading of the receipts issued to the plaintiffs for the peas there is printed the following limited liability clause: "It is expressly understood and admitted that this company do not inspect ¹⁷⁷ or examine condition of goods in receiving same, and therefore are not responsible for contents or damage; it is also further understood that this company will not be responsible for variation in temperature that may arise by accident to machinery or other unforeseen causes. This company will make special contracts at increased rates above tariff when parties storing require guarantee of temperature. In this case goods will be inspected and examined at the expense and risk of storer. This company reserves in such special contracts that forty-eight hours' notice to the storer that machinery or building is disabled will terminate such contract and their responsibility under same. Not accountable for leakage, depreciation or damage by rats."

This clause is not specially insisted on in the brief, nor was it pressed in the argument, but giving the defendant the full benefit of it, we do not think that it relieves defendant of its obligation as cold storer to preserve the goods in the condition in which they were when received.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be set aside and that the plaintiffs have judgment against the defendant for the sum of two hundred

and sixty-eight dollars and twenty-six cents (\$268.26), with five per cent per annum interest from this day.

It is further ordered, adjudged and decreed that the price of the sale made by the sheriff in this suit belongs to the plaintiffs, but that the same is subject to the privilege in favor of the defendants hereinafter decreed.

It is further ordered, adjudged and decreed that the demand of the plaintiffs for eight hundred and sixteen dollars and ninety-seven cents (\$816.97), difference in the price of the 642 sacks of peas sold as damaged, be rejected as in case of nonsuit.

It is further ordered, adjudged and decreed that the defendant have judgment against the plaintiffs for the sum of eighteen hundred and ninety-six dollars and sixty-five cents (\$1896.65), with five per cent per annum interest thereon from the 18th of October, 1898, and that to secure this judgment the defendant have a depository's privilege on the price of the sale made by the sheriff in this suit.

It is further ordered, adjudged and decreed that the defendant pay the costs of the main suit in the lower court and the costs of appeal; and that the plaintiff pay the costs of the reconventional demand.

178 ON REHEARING.

BREAUX, J. Application was made for a rehearing on a number of grounds which we considered sufficient to reopen the case and hear further argument.

Plaintiffs contended that the loss resulting from the deterioration of peas was amply shown, and that our decree should be amended so as to allow them an amount equal to this loss. Secondly, that defendant had no right to hold possession of the property stored until all charges had been paid, for the reason that plaintiffs were always willing to pay storage on any goods which they would withdraw, and the \$1,290.59 admitted by plaintiffs in their petition to be due was for storage on the goods already withdrawn; that an amount claimed of \$606.06, and heretofore allowed, was never earned. The charge was for preservation of goods, which had not been earned; that the price fixed in the decree for the peas was too low and that it should be increased to an amount equal to the value of sound peas at the time. Defendant made no application for a rehearing, but in argument at bar, through its learned counsel, contended that all the issues should be reconsidered and the whole claim rejected.

There was much said by defendant's counsel in argument which was persuasive, in view of the restricted liability stipulated in the contract of storage between plaintiffs and the defendant. Heretofore it was considered that throughout the trial the burden of proof was with plaintiff, in view of this contract. None the less, after having considered the evidence, the court concluded that its weight was with plaintiffs, and rendered its decree accordingly.

We are impressed by the argument of defendant's counsel, made with force and clearness at bar, that our decision would perhaps prove somewhat of a hindrance to the cold storage industry. In consequence, as relates to storage, we are moved to go over the entire ground again.

The evidence, as heretofore considered, led us, we think, to a correct conclusion, although the practical observation of witnesses who testified in this case did not entirely accord with entomological science. We point out the difference between the two. Our conclusion is that, in the main, the difference is not considerable. Practically, it was thought by the witnesses that the insects by which the peas were destroyed were a part of the pea, coming spontaneously from it, and growing with it, ¹⁷⁹ and that when they reached the perfect condition, they flew away, committing no further damage.

We have found, after consulting several authorities, that entomology teaches that in the early spring the female weevil (*Bruchus pisi*, the pea weevil of the naturalist) fastens its egg upon the newly formed pod of the pea in a way that renders it difficult, at first, to find that the grain is attacked. The egg gives birth to a white larva, which feeds on the substance of the pea, and takes its life from it. The farinaceous substance of the grain is favorable to its growth, and it is while thus growing that the damage is done. When this larva passes into a perfect state, the weevil bores through the pods, and, as a destroyer, commits no further damage except in giving birth to eggs, which are inserted in the pea as before mentioned. Cold storage will not destroy the weevil; it can only check its growth and development while in an embryo state. In winter the weevil finds shelter from the cold in the cracks of walls and other secluded places. It does not increase. The cold destroys many. In summer they invade the different cereals. They do not lay their eggs on the surface, but at some depth in the heaps of grain, a very minute dot on the surface of the pea

being the only external evidence of the presence of a weevil larva.

We infer in this case the presence of the weevil or of its larva and the extent of the damage escaped the attention of the plaintiffs and the defendant. All agree that in cold air the weevil does not lay eggs and the larva is harmless. But it takes a temperature of, at least, ten degrees centigrade to check their increase. Here cold storage becomes useful, and is, when the peas have been properly stored, some protection against damage by weevil.

There are methods of destroying them that give rise to interesting study to the student of entomology. We are reminded by the necessity of some brevity that, although the subject is interesting, we must not pursue its study any further, and that we must limit our discussion to the work the cold storage undertakes when it receives peas on storage, and this we think we have done by indicating the degree of temperature required to check the growth of insects of the weevil kind.

Our decision found that the heaps of peas were too large, and that the defendant did not sufficiently look after the ventilation of the cold air it controls. After a re-examination, we are not satisfied that an error has been committed. Defendant places great reliance upon the ¹⁸⁰ receipt it gave for the peas and the limited liability clause printed therein. We understand that the defendant can limit its liability, and that those who sign the limited clause will be bound by its terms. But in this case oversight and negligence have been found which are not covered by the limited liability clause of the receipt, and from which we do not understand from the testimony that it ever was the intention to relieve the defendant. Certainly, the language used leads to such inference. One may stipulate waiver as extensive as he pleases, provided it does not contravene rules and laws enacted on grounds of public policy. The waiver must express the full extent intended.

We take up for decision each item separately. An exhibit identified by the letter "A" is annexed to the plaintiffs' petition and clearly shows that the cow-peas for which it accounts were sold from April 8, 1898, to July 22, 1898, for \$433.19. This exhibit was offered in evidence contradictorily with defendant, who permitted it to be filed without objection. We think we are warranted in considering it to be properly before the court, and that it and other evidence shows that plaintiffs are en-

titled to \$689.28 on item presented by statement "A." If sound, they would have brought, it appears, ninety cents per bushel—\$1,122.47. They sold for \$433.19. The difference they would have brought if not weevily is \$689.28.

In seeking to fix the value of these peas (not weevily when delivered to storage company), our attention was arrested by the testimony of a witness of the defendant who said that he, in 1898, commenced selling peas at ninety cents. Mixed peas were sold for seventy-five cents per bushel; Whip-poor-will at eighty-five cents. Another witness spoke of eighty cents as having been the selling price. True, plaintiffs' peas were of the better quality of clay peas and worth from ten cents to twenty-five cents more than the other. Taking the minimum of value of the ordinary and mixed peas and the minimum additional for the clay peas, we fix the price at ninety cents a bushel. It must be remarked that these peas were carried over by plaintiff from the season of 1897 to be sold in 1898, when they were not as valuable, we infer from the testimony, as they were in 1897, and not as fresh as they were in the latter year.

The next ground of complaint is based on the refusal of the defendant to deliver the peas to plaintiffs before the storage was paid. Defendant held possession and claims for storage while it held possession.

¹⁸¹ Plaintiffs deny defendant's right to recover for this storage because, as they aver, they offered to pay charges for storage which they assent defendant refused to accept.

Plaintiff's contention is that separate negotiable warehouse receipts had been issued by the defendant for the peas; that defendant could not in law refuse to deliver the peas called for by one of the receipts, upon the ground that the storage on other peas which had been withdrawn on other receipts had not been paid. In other words, that it was not an advance made on the deposit, nor a claim arising from the deposit of the particular goods stored which plaintiff wished to withdraw from storage. Plaintiffs say that they were willing to pay storage on the goods they desired to withdraw, but on none other, although, as we understand, there were other charges due.

The Statute 156 of 1886 is clear enough that on the presentation of a warehouse receipt properly indorsed and the tender of charges upon the property represented by it, the holder of the receipt is entitled to the property it covers. While it is true that under the terms of this statute the holder of the re-

ceipt is entitled to delivery of the property upon the tender of payment of all charges on the particular property for which the receipt calls, yet there must be a tender in order to enable the holder of the receipt to recover damages growing out of delay in not delivering the goods when delivery was timely and properly asked.

Here there was no tender made. There was an offer such as is usual in a business community during the course of business, as will be seen from the following, which is copied from the testimony:

“Cross-examination.

“Q. Did you tender them in cash the amount of money due on those peas? A. No, sir; not in cash.

“Q. Did you tender them anything? A. No, sir.”

Clearly, this being the fact as relates to tender, plaintiffs continued to owe storage on the property which they did not offer to withdraw by making the tender the statute requires.

Plaintiffs claim the amount of \$606.06 for storage on the damaged goods. The complaint on this score is that plaintiff was to pay four times the ordinary warehouse charges, and that, as defendant did not preserve the peas, it failed in performing its ¹⁸² contract, and is, in consequence, not entitled to anything; that it should not recover compensation for failing to do that which it had bound itself to do. The defendant did not succeed in preserving the property, it is true, but, at the same time, it does not appear to us that there was such culpable negligence as renders it necessary to hold that it has lost all right to anything for the services it did render, although it failed.

The property stored, although damaged, retained some of its value; besides, defendant is condemned to pay its value—that is, to make up for the loss by paying the difference between sound and unsound peas. It should receive storage on the theory that if these peas had been sold in a sound state, defendant would have received storage.

Plaintiffs complain of the value of the peas as found by the court. The original opinion states, and this is not denied by plaintiffs, that it was at plaintiff's request that the peas were sold at public auction. The theory of the opinion was that plaintiffs had not complied with the statute cited *supra* with regard to tender, and that defendant was not alone at fault for the delays in disposing of the peas; that plaintiffs, also, had

given them, at least, an implied assent by not energetically demanding delivery of the property and tendering the amount due thereon. We are not convinced that we should change that ruling and recall all that has been heretofore held in that regard.

We have not found any good reason to increase the number of bushels from 1,578 to 2,180 bushels. The court concluded heretofore, to adhere to the minimum number. We would not feel justified in changing the number, unless it was manifest that an error had been committed. We do not change and increase the amount heretofore allowed for the peas sold by the sheriff, particularly, for the reason that the following which appears of record would not warrant an increase: "It is admitted that this receipt calling for 2,029 sacks of peas, on the reverse of which is written 730 sacks delivered to Mark and Rittner, 1,569 sacks to the sheriff, were stored in the warehouse as weevily peas on the date specified in the receipt."

In view of this fact, we do not think that the price or the weight of the lot should be changed, for it may have been just as deficient in weight as compared with sound peas on the day it was delivered to the storage as on the day it was sold.

¹⁸³ To conclude, then, plaintiff is entitled to a judgment for six hundred and ninety-one and fifty-nine one-hundredths dollars (\$691.59), as above stated, with five per cent interest from this date, and to this extent the original judgment is amended, and in other respects it is affirmed, making, with the amount allowed in our original judgment, the sum of \$959.85.

As amended, our original judgment is reinstated and made the judgment of the court.

COLD STORAGE.

- I. Degree of Care Required.
- II. Liability in Damages for Negligence.
- III. Limitation of Liability.
- IV. Burden of Proof.
- V. Measure of Damages.
- VI. By Common Carriers.

I. Degree of Care Required.—The business of cold storage consists in the preservation of perishable articles of merchandise by means of ice, cold air or other device necessary to maintain the temperature required for the preservation of the property stored. Although this subject is comparatively new to the law, the rules governing it are already reasonably well settled. In the first place,

a cold storage company or other warehouseman who undertakes to preserve perishable goods stored with him is generally considered a bailee for hire, and the degree of care required of him is, in the absence of special and express agreement, that in keeping the goods he will exercise that degree of care and diligence for their preservation which may reasonably be expected from a person of ordinary prudence in his situation: *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158-160, 47 Atl. 653; *Holt Ice etc. Storage Co. v. Arthur Jordan Co.*, 25 Ind. App. 323, 57 N. E. 575. In all such bailments the nature and value of the property affects the question of ordinary care, and this degree of care is such as the generality of mankind use in their own affairs: *Minnesota Butter etc. Co. v. St. Paul Cold Storage etc. Co.*, 75 Minn. 445, 74 Am. St. Rep. 516, 77 N. W. 977.

A cold storage company impliedly undertakes to maintain the necessary temperature required for the preservation of property stored with it for the time that the property remains stored. If its stock of ice or other means employed for that purpose is insufficient, it must either replenish it or give timely warning to its customers to remove their property, and if it fails to do either, in the absence of circumstances charging its customer with knowledge of the situation, it is liable for damages resulting from such failure: *Sutherland v. Albany Cold Storage etc. Co.*, 171 N. Y. 269, 89 Am. St. Rep. 815, 63 N. E. 1100, reversing *Sutherland v. Albany etc. Co.*, 55 App. Div. 212, 66 N. Y. Supp. 835.

"The contractual obligation assumed by appellant when it accepted the property was that it would exercise care in its preservation, and that it would deliver it over to the bailor at the termination of the bailment. So far as concerned the care required of appellant during the bailment, it is immaterial whether the contract when made had a fixed or uncertain duration. The obligation to return the property in as good condition as when received, except that it may have been injured without the bailee's fault, continued until the bailment should end. Without stopping to inquire in what manner appellant might have terminated the bailment, it did not terminate it, but voluntarily continued it in force until the property was removed by the appellee. It must be conceded that appellant could perform its part of the contract only by delivering up the property in good condition, when the bailment ended. Appellee having complied with the contract had the legal right to such performance, and default in that regard was a violation of that right": *Holt Ice etc. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 323, 57 N. E. 575.

II. Liability in Damages for Negligence.—As a person who undertakes to keep the perishable goods of another in cold storage, and exacts charges for such undertaking, is a bailee for hire, the right to recover damages for the loss or deterioration of the goods while stored must necessarily depend on the negligence of the bailor

in failing to maintain the proper temperature or permitting noisome odors to come in contact with the subject of the bailment, and in this respect each case must depend upon its own particular facts. Thus, a bailee who receives dressed poultry to be kept in cold storage without any special agreement respecting the temperature to be maintained is not liable for a damaged condition of the poultry due to the fact that the temperature was too high, when it was such as is usually maintained in cold storage rooms, and both parties supposed that it would be sufficiently cold to preserve the goods. In such case the bailee is not negligent in failing to keep the cold storage room at the temperature of a "freezer": *Allen v. Somers*, 73 Conn. 355, 84 Am. St. Rep. 158, 47 Atl. 653. But if a cold storage company undertakes for a reasonable charge to take and store butter and keep it frozen and preserved, it is liable in damages if by its negligence such butter is permitted to become contaminated by deleterious odors from fruit stored in the same warehouse, especially if the bailor is not acquainted with the method of storage used: *Holt Ice etc. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575.

A cold storage company is liable for damages resulting from the contamination of eggs in storage due to the negligent escape of ammonia in the building, or by gases from fruit in adjoining corridors or rooms, entering the room where the eggs are stored: *Hunter v. Baltimore Packing etc. Co.*, 75 Minn. 408, 78 N. W. 11. Likewise a cold storage company is liable for the deterioration of eggs in storage resulting from a rise of temperature in its store-room due to the melting of ice therein, and the negligence of the bailee in failing to replenish the supply so as to maintain the necessary temperature to preserve the property: *Sutherland v. Albany Cold Storage etc. Co.*, 171 N. Y. 269, 89 Am. St. Rep. 815, 63 N. E. 1100.

A warehouseman who receives apples for cold storage is liable to the owners thereof to the extent to which negligence in failing to supply proper ventilation contributes to their decay, even if such decay is due in part to the condition of the property when placed in storage: *Townsend v. Rich*, 58 Minn. 559, 60 N. W. 545. So also a warehouse company is liable for damages to fruit taken in storage at a temperature ranging from thirty-five to forty degrees, but which was negligently placed in a much lower temperature, whereby it was frozen and ruined: *Greenwich Warehouse Co. v. Maxfield*, 8 Misc. Rep. 308, 28 N. Y. Supp. 732. The owner of fruit placed in cold storage under an agreement that it shall be kept at a certain temperature is entitled to recover such damages as he may sustain by reason of the damaged condition of the property, if it is conceded that the temperature was higher than that stipulated for, and it is shown that the damaged condition of the fruit resulted wholly or in part from a failure on the part of the bailee to maintain the temperature agreed upon: *Wilson v. Linde Co.*, 47 App. Div. 327, 62 N. Y. Supp. 69.

In the case of *Parker v. Union Ice etc. Co.*, 59 Kan. 626, 68 Am. St. Rep. 383, 54 Pac. 672, it was held that if the owners of a cold storage warehouse before opening it issue a circular advertising it as free from taint, but in its construction use pine boards on the inside and another person, upon the payment of storage charges, obtains the privilege of storing eggs therein, and both during the construction and afterward has ample opportunity to observe the use of such timber, and has experience in shipping and keeping eggs, while the owners of the warehouse were without experience, and the eggs are damaged by contracting the taint of such boards, all the parties are negligent, and there can be no recovery for the damage to the eggs. This case is, we think, opposed in principle to the later cases on the subject, in that it relieves the bailee of that degree of care due from him to the bailor. We take it that the ordinary man in building a cold storage warehouse out of pine boards is bound to know that the taint therefrom will damage certain kinds of perishable property if it is received in storage and allowed to come in contact with such boards. Hence, in the exercise of that ordinary care due from him to his bailor he must, in the absence of special agreement, employ such means as will prevent the property in storage from becoming tainted or damaged, notwithstanding the knowledge of the bailor of the condition of things in the building in which his property is stored.

In *Sutherland v. Albany Cold Storage Co.*, 171 N. Y. 269, 89 Am. St. Rep. 815, 63 N. E. 1100, it was decided, and we think properly, that a cold storage company impliedly undertakes the preservation of property stored with it by its customers for the time that the property remains stored, notwithstanding the opportunity of the owner to examine his property at any time and thus ascertain its condition and the condition of the warehouse. In this case as in the Kansas case, the subject of the bailment was eggs, and the damages complained of resulted from a rise in temperature in the storehouse due to the failure of the bailee to replenish the supply of ice therein and thus maintain the temperature necessary to preserve the eggs.

III. Limitation of Liability.—A cold storage company is not relieved from liability for damages resulting from the contamination of the property stored by the escape of ammonia or by gases from fruit in adjoining rooms, by the terms of a cold storage warehouse receipt stipulating that "all damage to perishable property is at the owner's risk." This stipulation must be considered as referring to loss resulting from the inherent qualities of the subject of the bailment, and a stipulation that the "company will provide any desired temperature, but will not be responsible for results" clearly refers exclusively to the results of the temperature requested by the bailor: *Hunter v. Baltimore Packing etc. Co.*, 75 Minn. 408, 78 N. W. 11. If a warehouseman receives cheese in wooden boxes in good

condition to be kept in a dry room at a certain temperature, and kept at such temperature by overhead pipes filled with brine, a receipt stating that the property is kept at the owner's risk of any loss or damage from water, etc., does not relieve the warehouseman from liability for damage caused by the dripping of the water from the overhead pipes resulting from the negligence of the bailee in not giving them the proper attention and care: *Minnesota Butter etc. Co. v. St. Paul Cold Storage Warehouse Co.*, 75 Minn. 445, 74 Am. St. Rep. 515, 77 N. W. 977. All of this is in accord with the rule laid down in the principal case that while a cold storage company may by contract limit its liability to a certain extent, the limited liability clause must be specific, and expressly include in its terms all damages and acts for which the cold storer does not hold himself responsible.

IV. Burden of Proof.—It has been held that one who contracts for the cold storage of eggs at a certain temperature must, in order to recover for damage thereto through the negligence of the bailee, show that they were in fit condition, and in such state as to keep at a stipulated temperature when stored, and that the deterioration thereof resulted wholly from the acts of the bailee: *Roswell v. Collins* (Pa.), 7 Cent. Rep. 487, 8 Atl. 845. The more reasonable rule, however, is, that in an action to recover for injury to goods while in cold storage, the bailor makes a *prima facie* case entitling him to recover, when he shows a delivery of the property in good condition to the bailee, and a return of it in a damaged condition, not resulting from any cause inherent in the property stored, and the burden of proof is then upon the bailee to show that the injury occurred in a manner consistent with the exercise of reasonable care on his part. This being shown, however, the bailor, in order to recover, must show positive negligence in the bailor causing the damage or loss: *Holt Ice etc. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575. Evidence that poultry placed in cold storage were in good condition, but when taken out they were moldy and decayed, and that the warehouse was damp which would form mold, and that mold would cause decay, will sustain a finding that the condition of the goods when removed was due to the negligence of the warehouseman, entitling the owner of the property to recover for the actual loss sustained without proof of more specific acts of negligence producing the damage: *Leidy v. Quaker City Cold Storage etc. Co.*, 180 Pa. St. 323, 36 Atl. 851. It seems that in an action against the owner of a cold storage warehouse to recover damages for injury to goods stored, the negligence of the bailee cannot be assumed from the mere fact that the goods were injured while in storage, but the negligent acts or omissions causing the injury must be affirmatively proved: *Leidy v. Quaker City Cold Storage etc. Co.*, 180 Pa. St. 323, 36 Atl. 851.

V. Measure of Damages.—If a person agrees to take fruit in storage at a certain temperature, and the decay of the property is caused by the temperature being allowed to reach a much greater height than that stipulated for, thereby causing a diminution in its market value, such diminution may be considered as an element of damages in an action for a breach of the contract: *Hyde v. Mechanical Refrigerating Co.*, 144 Mass. 432, 11 N. E. 673. The measure of damages for the improper storing of eggs in a cold storage room, which is claimed to be especially adapted to the purpose, is their market value in the locality where injured at the time they were injured, and not the highest market price the bailor could have obtained at that time in any market, and when the market is fluctuating, and the prices somewhat indefinite, the average range of price about the time that the property is injured affords the proper standard as to the market value: *Adams v. Sullivan*, 100 Ind. 8. The measure of damages to butter from contamination by deleterious odors while in cold storage in a warehouse under a contract of bailment with no time fixed when the bailment should end is the difference between the market value of the butter at the time the bailment was ended by the parties, if it had then been in good condition, and the market value thereof in its damaged condition at such time, although the butter was continued in storage after both parties knew that part of it had become damaged: *Holt Ice etc. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575. The market price to be considered in determining the damages to poultry injured by the negligence of a cold storage company is such as is obtainable for such poultry kept in cold storage for the same length of time, and the recovery must be limited to the actual loss sustained: *Leidy v. Quaker City Cold Storage etc. Co.*, 180 Pa. St. 323, 36 Atl. 851.

VI. Common Carriers.—Within the last decade it has become customary for common carriers by rail to transport perishable property in temporary cold storage in what are known as refrigerator-cars. This custom has given occasion for considerable litigation, and in Missouri the courts have decided that a common carrier who runs a refrigerator-car is not, in the absence of express contract to carry by means of such car, liable for damages caused by heat to an article of perishable nature carried in an ordinary car: *Wetzell v. Chicago etc. R. R. Co.*, 12 Mo. App. 599. And also that the carrier is not bound, as matter of law, to furnish any particular kind of car for the transportation of perishable goods, but that the failure to furnish refrigerator-cars may, in a particular case, be a fact for the jury to consider in determining the question of negligence: *Udell v. Illinois Central R. R. Co.*, 13 Mo. App. 254. On the other hand, in the well-considered case of *Beard v. Illinois Central R. R. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800, it was decided that a common carrier receiving perishable property for transporta-

tion must guard it from destruction by the elements, from the effect of delays, and from every source of injury which he may avert, and which in the exercise of care and ordinary intelligence, may be known or anticipated, and to the same effect is *Pierce v. Southern Pacific Co.*, 120 Cal. 156, 47 Pac. 874, 52 Pac. 302. Hence, a common carrier who has knowingly received butter for transportation must exercise the care and diligence necessary to protect it from the heat, and carry it in improved cars, if such cars are in use, and cannot escape liability for not safely transporting on the ground that it did not have cars sufficient for that purpose, that the car was sealed when received, that it was customary to haul cars received from connecting lines without changing the goods in them, or that the rate of charges as shown by the way bill was for common cars only: *Beard v. Illinois Central R. R. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800.

If a common carrier accepts fruit for transportation to a distant place, and, instead of packing it in a refrigerator-car, packs it in a car with apertures through which the cold air and snow enters, whereby the fruit is frozen, he is liable for the damage, and cannot shield himself by a statement in the bill of lading that he is not liable for injury caused by the weather: *Merchants' Despatch etc. Co. v. Cornforth*, 3 Colo. 280, 25 Am. Rep. 757.

Freight charges for perishable goods will not limit the care to be exercised by the carrier in the method of transportation, nor restrict his liability, unless the charges fixed in the way-bill express a contract that the goods may be carried so as to destroy their value, and that excuses the carrier from the exercise of due care to preserve the goods: *Beard v. Illinois Central R. R. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800.

Negligence in failing to provide a safe and suitable refrigerator-car in which to transport meat renders the carrier liable to the owner thereof, although the car was inspected by the packing company of whom he bought the meat, if such inspection was made as the agent of the carrier, and a clause in the bill of lading limiting liability, "for decay of perishable articles, or injury by heat or frost," does not relieve the carrier from liability for negligence in furnishing a defective refrigerator-car for the transportation of meat: *Chicago etc. R. R. Co. v. Davis*, 159 Ill. 53, 50 Am. St. Rep. 143, 42 N. E. 382. If it is sought to recover damages to lemons shipped by rail, caused by their negligent transportation in an unventilated car, upon proof of a custom in the fruit trade of shipping lemons in ventilated cars in warm weather, evidence is admissible to show whether between periods of hot and cold weather transportation companies used their own judgment in selecting cars, or the shippers gave instructions to the companies: *Giles v. Fargo*, 60 N. Y. Sup. Ct. Rep. 117, 28 Jones & S. 117, 17 N. Y. Supp. 476. If recovery is sought for the loss of a car of butter caused by the negligence of the carrier in not taking proper precautions to pre-

serve from the heat during transportation, evidence is admissible to show a custom among carriers to put butter in cold storage when refrigerator-cars are not ready to receive it: *Beard v. Illinois Central Ry. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800.

If eggs are placed in a refrigerator-car properly iced to prevent from freezing, and on arriving safely at their destination are placed by the carrier in its warehouse, it is still bound to use common and ordinary prudence in storing them and if the warehouse is not a proper place for such storage in the winter time, the carrier is guilty of negligence and liable in damages if the eggs become frozen while in such warehouse: *Burroughs v. Grand Trunk Ry. Co.*, 67 Mich. 351, 34 N. W. 875. If fruit is shipped in refrigerator-cars, under an agreement that the carrier "shall not be liable for loss or damage by causes beyond its control or by heat," and the cars have side doors which are air-tight when closed, and ice boxes open at the top, which cannot be kept open when in transit, and the cars are closed during transit, without any stipulation that the fruit shall be ventilated at way stations, the shipper assumes the risk of injury to the fruit from insufficient ventilation and excessive heat during the transportation: *Densmore Commission Co. v. Duluth etc. Ry. Co.*, 101 Wis. 563, 77 N. W. 904.

The carrier cannot escape liability for damages resulting from its failure to provide suitable cars for the conveyance of the particular class of perishable goods it undertakes to carry by showing that the cars used for the purpose of its own transit are the property of another who undertook to provide the necessary materials to insure the fitness of such cars for such transportation. The owners of the cars are deemed the agents and servants of the carrier, and the latter is held to the same liability as if it owned the cars: *New York etc. R. R. Co. v. Cromwell*, 98 Va. 227, 35 S. E. 444.

The presumption arises that perishable goods shipped in good order continue in that condition when in the hands of a connecting carrier, and the burden of proof is on him to show that they were not in good condition when received by him: *Beard v. Illinois Central R. R. Co.*, 79 Iowa, 518, 18 Am. St. Rep. 381, 44 N. W. 800.

LE BLANC v. SWEET.

[107 La. 355, 31 South. 766.]

CARRIERS OF PASSENGERS—Care Required of.—A carrier of passengers is bound to exercise the strictest diligence in receiving a passenger conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit. (p. 317.)

CARRIERS OF PASSENGERS — Negligence — Burden of Proof.—If an inexperienced passenger on a steamboat is drowned upon reaching her destination in an attempt to transfer her to a skiff at night, and while the steamboat is in motion the carrier is presumed guilty of negligence, and the burden of proof is upon him to show that the accident was not the result of the fault of his officers or representatives. (p. 317.)

CARRIERS — Negligence—Burden of Proof.—There is a broad difference between the obligation of a carrier to a passenger and his obligation to a third person complaining of a tort, and the burden of proof, in the latter case, rests upon the complainant to establish both the injury and the negligence which caused it; whereas it is sufficient for a passenger, suing on a contract for safe carriage, to establish the contract and to show that he has not been safely set down at his destination, to throw the burden of proof on the carrier to prove an absence of negligence on his part. (p. 317.)

NEGLIGENCE—Damages—Measure of for Death.—The surviving parents of a girl, sixteen years of age, who was drowned through the negligence of a carrier, may recover as damages expenses incurred in finding and burying the body, loss of services and filial offices, and the amount which the daughter herself was entitled to recover at the moment of her death. (pp. 317, 318.)

NEGLIGENCE—Master and Servant.—The owner of a steamboat is alone, and not jointly with the master thereof, liable for the negligence of the latter while acting in his representative character. (p. 318.)

Story & Pugh and T. R. Smith, for the appellants.

P. J. Chappuis and J. D. Grace, for the appellees.

356 MONROE, J. Plaintiffs, who are husband and wife, sue Daniel E. Sweet, as owner, and Henry L. Sweet, as master, of the sternwheel steamboat "Olive," for damages, alleged to have been sustained by reason of the drowning, through the negligence of the defendants, upon the night of July 4, 1898, of their minor daughter, Helen, a young girl of sixteen. The defendants deny that they were guilty of negligence, and allege that the death of the minor was brought about by her own imprudence.

It is beyond controversy that the plaintiffs reside upon the Bayou Queue de Tortue, twelve miles above the point at which

it enters Mermentau river; that reckoning from the same point, the town of Mermentau is situated about twelve miles up, and the town of Lake Arthur, upon a lake of that name, about six miles down, that river; that, upon the Fourth of July, 1898, a young man named Valsin Stutes, with four young ladies, viz., his two sisters, Azelda and Elizabeth, Miss Amanda Aube, and Miss Helen Le Blanc, went, by skiff from the Le Blanc residence to Lake Arthur, to participate in celebrating the day; that, at Lake Arthur, they met Adam Simon, who invited them to return, as his guests, as far as the mouth of the Bayou Queue de Tortue, on the steamboat "Olive," which, at the close of the day, was to carry a number of excursionists from Lake Arthur back to the town of Mermentau, and that they accepted the invitation, and boarded the boat, by which their skiff was taken in tow; that about 10 o'clock that night, and on, or just before, reaching the mouth of the bayou, a "slow bell" was rung, Valsin Stutes got into the skiff, followed by his sister, Azelda, and Miss Aube, and then by Miss Le Blanc, and that, when Miss Le Blanc got in, the three young ladies were precipitated into the river, with the result that Miss Le Blanc was drowned.

With regard to other facts and circumstances, there is considerable conflict in the testimony. The theory propounded by the plaintiffs is, ³⁵⁷ that it was understood between Adam Simon and the captain of the boat that Simon and his friends were to be transferred, upon reaching the mouth of the bayou, to their skiff, and that, as they were about reaching that point, the boat was slowed down and the party were notified to get into the skiff, the bow of which was held alongside the boat by Harrington, the fireman, and the stern, by Sweet, who was acting in the double capacity of master and engineer, but that the boat, which had been making seven miles an hour, was only slowed to about half speed, and that its continued movement, the agitation of the water, and the consequent tendency of the skiff to get under the "guards" of the boat, rendered such a mode of transfer exceedingly dangerous, especially at night, and that the officers of the boat ought to have known, whilst Miss Le Blanc and some other members of the party, having never before been on a steamboat, were ignorant of, the danger. The theory of the defense, upon the other hand, is, that it was the intention of the officers of the boat to make a landing upon the river bank, upon the lower, or down stream, side of the mouth of the bayou, and that whistles had been blown, signal

bells rung, and the boat slowed down, with that view, but that the young ladies, of their own accord, or at the instance of their escorts, and without the knowledge of the officers, undertook to get into their skiff in the manner and with the result as stated.

Plaintiffs' theory is supported by the following positive and affirmative testimony, which we recapitulate, in substance, to wit: Adam Simon testifies that his friends, having come by skiff from their homes, on the Queue de Tortue, to the town of Lake Arthur, he met them at the latter place; that the "Olive," having brought a party of excursionists (the witness among them) from Mermentau, and being about to proceed farther on Lake Arthur, he took his friends on board, and whilst on board asked the captain if he would take them, as the boat returned to Mermentau, and put them and him off at the mouth of the bayou, informing the captain that they had their skiff, asking him to tow it to the mouth of the bayou, and stating that they would there get into the skiff from the boat, and thus reach their homes; to all of which the captain gave his assent; that about 10 o'clock that night, the party being on the boat, and the boat on the way to Mermentau, the pilot, or someone else connected with the boat, notified him that the mouth of the bayou was "right around the bend," and that he and his party had better get ready, and that he accordingly took the ladies down stairs, i. e., from the boiler, or cabin, deck, to the lower, or main, deck, in order ³⁵⁸ that they might be ready to get off; that Valsin Stutes got into the skiff, which was alongside, and held it, and that Harrington, the fireman of the boat, also held the skiff, at the bow, whilst Sweet, the captain, held it at the stern, and that Harrington said "get in"; that he, the witness, then turned to speak to someone near him and did not observe how the ladies got into the skiff, but that he heard a noise and found that they had fallen into the river, and that he and the captain pulled Miss Aube out, and took her to the engine-room, whilst Valsin got his sister out; that he then found that Miss Le Blanc was missing, and he went into the water and swam around searching for her, but without success; that at the moment of the accident the boat was in the middle of the river (which is about one hundred yards wide), immediately opposite the mouth of the bayou, with her bow pointed straight up the river, and, though the engines had stopped, was still in motion, and "was driving pretty fast, so that Miss

Aube's dress was flying through the water, and they had to pull to get her into the boat." The witness further testifies that the boat made no landing at the mouth of the bayou, but that, when the search for Miss Le Blanc was abandoned, he and his friends went off in their skiff.

Valsin Stutes testifies that no one told him that it was time to go, but that (knowing it himself, as we understood his testimony) he got into the skiff to bail the water out; that Harrington unfastened the skiff and held it by a chain at the bow, whilst Sweet held the stern, and that Harrington twice told the ladies to get in; that his sister Azelda and Miss Aube got into the after part of the skiff and Miss Le Blanc into the forward part, and that he is unable to say how the accident happened, save that the skiff tilted and they went overboard; that Sweet and Simon assisted Miss Aube out, whilst he helped his sister; that the boat was opposite the mouth of the bayou, moving slowly, though the engines had been stopped; and that there were some waves, making the water a little rough.

Mrs. Simon, who was then Miss Azelda Stutes, testifies that she and the others went down to get into the skiff, at the suggestion of Adam Simon, and that they found two men holding the skiff, one (whom she identified as Harrington) by a chain attached to the bow, and the other (whom she identified as Sweet, but only from information obtained afterward) holding the stern, and that Harrington twice told them to get in; that Valsin was already in the skiff, and that she was the first of the young ladies to get in, and was followed by Miss Aube and then ³⁵⁹ by Miss Le Blanc; and that when the latter got in the skiff tilted and they were precipitated into the water, from which she was taken by her brother and Simon, and Miss Aube by Simon and another man. She testified that Miss Le Blanc was very heavy, and she gives it as her opinion that if Miss Le Blanc had gotten in easily they would not have been thrown out, though she also states that she and Miss Aube were standing and that there were some waves.

Miss Elizabeth Stutes testifies that she and the others went to the side of the boat to get into the skiff, at the suggestion of Adam Simon, and that there was a man holding the bow of the skiff and another holding the stern, but she does not undertake to say who the men were. She further states that she was looking elsewhere and did not see who got into the skiff, or the order in which they got in; that her at-

tention was attracted only when she heard them in the water, and that she did not see who took her sister and Miss Aube out.

The theory propounded by the defendants is supported by the following testimony, also given in substance, to wit: Henry L. Sweet testifies that he was acting as both master and engineer of the "Olive"; that Simon had asked him to let his party off at Bayou Queue de Tortue, but had said nothing as to the manner of debarking, and that he is unable to say that he knew that they expected to get ashore in their skiff, but that he knew, because they told him, that they lived on Bayou Queue de Tortue; that they did not take the skiff with them on the lake, but, on the return of the "Olive" to the town of Lake Arthur and before starting to Mermentau, he had it made fast to the port side of the boat, and was aware that it was being towed; that he notified the pilot that there were some ladies to be "let off" at the mouth of the bayou, and whilst he did not tell him, in words, to make a landing directly on the shore, it was his intention that such a landing should be made, on the point on the lower side of the bayou; that a short distance below the point mentioned three whistles were blown, which indicated that the boat was about to make a landing, and that, so far as he knows, the boat was proceeding in the ordinary way to make a landing, though he does not know how she was heading when the accident occurred; that he received a "slow bell" just before the accident and shut off steam, in part, but that it is hard to tell whether the speed of the boat had been diminished, as a boat will run quite rapidly, from acquired momentum, for a full minute after steam is shut off; that he was still in the engine-room when he heard the screams which indicated that the accident had happened, ³⁶⁰ and that he then shut off steam entirely, stopped and reversed his engine, and ran out and caught hold of one of the ladies at the rear end of the skiff, and that he was among the first to get there; that he did not shut off steam after he had rendered this assistance, but that he then ran and stopped his engine, which he had before reversed; and thereafter he does not seem to know very clearly what took place, as he is unable to tell how long he stayed in the engine-room, or what became of the ladies who were taken out of the water, save that they eventually went off in their skiff, without his knowledge. The witness further states that he considers it part of the duty of the captain to see that passengers are safely landed, but that he usually has others to attend to that duty; that on the night of the accident there were

employed on the "Olive," besides himself, a pilot, a fireman, a negro cook, who also acted as deckhand, and two men, Maignaud and Hoffman, whom he had engaged to help him; that he notified Simon, about fifteen minutes in advance, that they were approaching the bayou; that the boat at the time of the accident was just below the mouth of the bayou; that the boiler is located forward and the engine aft, with about sixty feet between, and that the skiff, from which the ladies were thrown, was made fast a little forward of the middle of the boat. He states that the guards of the boat extend about four feet beyond the hull on each side, and are about twelve or fourteen inches above the surface of the water, and that, as a general thing, it would produce no effect, other than to lower the skiff in the water, to force it under the guards, but that if a person stepped into the skiff and it caught the guards, it would throw the person out. He further testifies that it would have been no trouble to make a proper landing, and he also says that on the lower river it is quite customary to take people off and on by means of skiffs, and that it is not dangerous "if they will only let the boat come to a standstill."

Louis H. Michon was the pilot of the "Olive." He testifies that he was told by Captain Sweet, before leaving Lake Arthur, to stop at the Queue de Tortue, as they had some ladies to let off; that he knew that if they had ladies to let off they had to make a landing; that after leaving Lake Arthur, Simon came to the pilot-house and asked him to stop, because he had ladies to take off, and that he replied that he would take no orders from him and that he had better go to the captain—that it was no use to ask for a "slow bell," but that he did not tell Simon that he had already received orders from Sweet; that when **361** they came near the bayou he blew three whistles for a landing, and that he would not have blown for a stop in the middle of the river; that passengers are frequently transferred in that way (i. e., from boat to skiff, in the river), but in such cases he gives one bell, for a stop; that the boat must always be brought to a standstill before the transfer is attempted; and that it is dangerous to attempt it otherwise. He further states that, after blowing the whistle, he gave a "slow bell," so that he could bring the boat around, bow on, to the point below the mouth of the bayou, as it would be dangerous to make the landing without doing so; and that just then he heard a scream, to which he did not pay much attention; that the scream was,

however, followed by cries of "Stop her! Back her! Somebody overboard!" that he then rang the bell to stop and back, and that the engine at once stopped and backed, as the boat was moving, under the slow bell, at about two and a half miles an hour, and that he was unable to finish the landing and was obliged to let the boat drift ashore, below the mouth of the bayou; that he remained on the roof until the boat had drifted ashore and had come to a dead stop, and then went below and found Harrington in the fireroom, but did not see the young ladies in the water, nor did he see two men holding one of them in the water; and that, as between the statement, "one of the girls was still in the water, and two of the men were holding her, and I helped pull her on the boat," made by him in giving testimony shortly after the accident, and the one which he now makes, he stands by his present statement, though made some two years later than the other, because he has had time to think over it. He further testifies that whilst he does not know which side the skiff was on, if it was on the left-hand side, coming up, the side from which he heard the screams, and forward, it could have been pushed under the guards by reason of the turn which the boat was making, and that it was a dangerous place to enter the skiff; and that, if a person should get into it in such a position, the skiff would probably be pushed under the guards, and the person thrown out, either between the skiff and the boat, or on the outside of the skiff, but that the skiff could be kept out by a person in it. He further testifies that the young lady fell overboard about one hundred and fifty yards below the mouth of the bayou, and that the Mermentau runs southwest to the sea, but is within the ebb and flow of the tide.

Ed. Harrington was the fireman, and testifies that he was firing when the accident took place; that it is not true that he was holding ³⁶² one end of the skiff and Captain Sweet the other when the young ladies got in; that he did not tell them to get in, or hear anyone else do so, and that he did not know that they were going to get in; that he did not see them fall, but that, after they had fallen into the water, he helped to pull one of them aboard. He also testifies that when the whistles were blown, he shut off the draught under the boiler and came out of the fireroom to see where the landing was to be made and to get ready for it—handle the lines, etc.—and that he was standing in front of the boiler when the accident occurred, the

boat being near the middle of, and headed directly up, the stream, two hundred or two hundred and fifty yards below the mouth of the bayou, and moving at the rate of about three or four miles an hour—half speed—with the skiff about amidships, on the port side; and that, as they were rounding a bend, the skiff was pressed against the side of the boat.

John Wright testifies that he has known Harrington and Sweet since he was a child; that just before the accident he was standing on the boat, near the skiff, talking to Miss Le Blanc, and shook hands with her and said "good night," as she stepped into the skiff, but did not assist her in getting in; that the young man, Valsin, and the other two young ladies had gotten in, and that Miss Le Blanc then put her foot on the seat of the skiff and "slided into the river"; that she did not jump into the skiff heavily, but was stepping lightly and that the skiff went under the guards, and that "she just naturally slided"; that the boat was not running at the time, and that he does not know what caused the accident. He further testifies that he saw no one holding the skiff, but that, just after the accident, he saw Harrington near the head of the skiff, and Sweet standing in the middle of the boat, looking, as he supposed "for the girl," but that he did not see who pulled the young ladies out of the water; he also says that he saw Sweet coming from the engine-room; that the accident occurred about five hundred feet below the mouth of the bayou; that the distance from the deck of the boat to the seat, upon which Miss Le Blanc stepped, was about eighteen inches; and that prior to the accident, as he was talking to Miss Le Blanc, he was not noticing the people around him. There is some other testimony, most of it, including that of a witness named Cousins, of a purely negative character, which needs not be particularly commented on, the foregoing synopsis embracing all that we find necessary to the solution of the questions: ³⁶³ 1. Did Miss Le Blanc attempt to board the skiff upon the invitation of the officers of the boat, or by reason of her reliance upon their offers of assistance, whether express or implied, or upon the faith of provision made by them with reference to such attempt? 2. Was the attempt dangerous, and were the precautions taken commensurate with the danger?

The irreconcilable conflict in the testimony given by the witnesses for plaintiffs and defendants, respectively, renders it necessary that the whole should be carefully analyzed with

reference to the circumstances which led up to and surrounded this most lamentable affair, and with reference also to the relation which the several witnesses bear to the case, and to the litigants.

Considering first, the circumstances: Valsin Stutes, accompanied by his two sisters and the other young ladies, had left their homes on the bayou to go to Lake Arthur in a skiff, which being some sixteen or eighteen feet long, was quite large enough to have accommodated a larger party, and they expected to return by means of the same conveyance; in fact, so far as concerns the twelve miles which separate the mouth of the bayou from Miss Le Blanc's residence, it is not suggested that there was any other way for them to return, and, as a matter of fact, the survivors of the party eventually returned in that way. Upon reaching Lake Arthur, they found that the "Olive" had brought down from Mermentau a party of excursionists, and was going to make a trip out on the lake and, in the evening, return to Mermentau, passing the mouth of the bayou on which they lived. Upon the invitation of Simon, who was one of the excursionists, but who wished to return up the bayou with them, they boarded the boat, in order, no doubt, to enjoy the novelty, as some of them had never been on a steamboat before, to participate in the excursion on the lake, and to enjoy that mode of travel, with the company on board, as far, on their way home, as the mouth of the bayou—nothing else being contemplated, however, but that, from the mouth of the bayou, they should make the remainder of the voyage as they had come, by skiff. All this, we think, was made known to Captain Sweet, when Simon asked him to take the party as passengers, and the probabilities strongly support the testimony of Simon to the effect that it was understood between him and Sweet that when they reached the mouth of the bayou, they would be transferred from the boat directly into the skiff, which the boat had in tow, instead of being put ashore, ³⁶⁴ only that they might then re-embark in the skiff. The former method of transfer is shown to be quite common, is less troublesome to both boat and passengers, and, when properly directed, is accompanied by but little, if any, more danger than the other.

Beyond this, we find that when the accident occurred the boat was near the middle of the river, with the bow pointed straight up that stream, and, as we conclude, opposite to the mouth of the bayou. It is true that upon this point the evi-

dence conflicts, some of the witnesses stating that the boat was then below the mouth of the bayou, from one hundred and fifty to two hundred and fifty yards, but the physical fact, which is unquestioned, that three days later the body of the drowned girl, as also her umbrella, were found at the very mouth of the bayou, taken in connection with the fact that the boat commenced backing almost immediately after the accident, we consider conclusive; for there is nothing in the record which would lead us to believe that the body would have drifted one hundred and fifty or two hundred yards against the current of the river, and still less to justify the belief that two objects, differing so entirely in form and substance as a human body and an umbrella, and sinking in from forty to sixty feet of water, would drift that distance up stream, and be found at the expiration of three days at the same spot; and we can well understand that witnesses composing an excursion party, returning at 10 o'clock at night from an all-day Fourth of July celebration, would be more likely to note the position of a boat from which such an accident had happened after the excitement had somewhat subsided than at the moment.

There is no doubt that the captain knew that a party of four ladies and two men were about to get off the boat, for he testifies that he notified Simon that they were approaching the mouth of the bayou.

It is equally beyond question that he considered it the duty of the captain to see his passengers safe ashore, though he states that someone else usually represented him in the discharge of that duty. It appears, however, that the "Olive," a stern wheel boat, about ninety feet long, was that night carrying some sixty passengers, and that the officers and crew consisted of the captain, who also filled the berth of engineer, a pilot, a fireman, a negro cook, and two men who are said to have placed their services, in case of need, at the disposal of the captain, the one being Maignaud, the proprietor of a saloon in Mermentau, the other Hoffman, occupation not shown, both of whom, however, had remained on the roof, near the pilot-house, from the time the ³⁶⁵ boat left Lake Arthur, and had received no intimation that their services were needed to aid in the landing of passengers at the Queue de Tortue. It seems clear that the pilot could not have been expected to leave his wheel for that purpose, and it is not pretended that anything of the kind was expected of the cook, so that if such service was to be rendered,

the captain and the engineer, both of whom were on the main deck from which the passengers were to get off, were the men, and the only men, to render it. But although quite a number of persons had assembled on the side of the boat to see the passengers get into their skiff, the captain testifies that he was in the engine-room and knew nothing of it, and the fireman testifies that he was in front of the boiler, and was equally ignorant. Nevertheless, the captain was among the first to take hold of Miss Aube, having for his assistant Adam Simon, who was standing beside the skiff when she fell into the water, and the fireman seems to have been about as promptly on the spot, to render the same kind of assistance, either to Miss Aube or to Miss Stutes, the captain, according to his version of the matter, coming from the engine-room thirty-five feet away, and having first stopped to shut off steam and reverse his engine after the young ladies had fallen into the river, and the fireman having come from the bow of the boat, a distance equally great or greater. If our conclusion as to the place in the river at which the accident occurred be correct, the boat, at the moment of the accident, had already passed the point from which to head in to the shore for the purpose of making a landing, as she was then in the middle of the river, heading straight up stream, with her port side opposite the mouth of the bayou, whilst the point at which it is claimed that the landing was to have been made was the angle, constituting the lower shore of the bayou and the left or west bank of the river. The pilot claims that it was necessary to make something of a wide turn in order to effect the landing, and that it would have been dangerous to have done otherwise, though he was going up stream, with plenty of water, and a bluff bank to land against. Without undertaking to question this alleged necessity, we do not understand him to pretend that it would have been the proper thing to have passed the place of landing, and, having turned his boat, to have approached it from the up-stream side. He says, also, that he had blown his whistle three times, which indicated that he intended to make a landing, and that he would not have blown it at all for a stop to let passengers off in the river; and it is no doubt true that he did blow his whistle, and, possibly, three times, but it is also true, as we think, that ³⁶⁶ when the accident occurred, he had passed the landing place, and though the boat had been slowed down, she was still in the middle of the river, with

her bow pointing straight up-stream, and her position gave no indication whatever that a landing was contemplated, or that anything else was to be done except slow down the boat.

Considering, now, the opportunities which were afforded the different witnesses to obtain the information which they have given on the trial and their respective relations to the case and to the litigants, as also some further features of the testimony given by them: The four who give the affirmative testimony, to the effect that Sweet and Harrington held the skiff whilst the young ladies got in, and that Harrington told them to get in, appear to be entirely without pecuniary interest, but, being actors, and directly concerned, in the matter of their transfer from the boat to the skiff, it seems likely that they should have been able to see better, and should have paid more attention to the arrangements by which that transfer was to be effected, and should be better informed concerning them, than bystanders, who took no such part, and had no such interest at stake. Of the witnesses on the other side, Sweet is one of the defendants, and Harrington, the other, is charged with having actively participated in carrying out the arrangements whereby a human life was lost, and as a result, his employers, or former employers, are sought to be made liable for something over fifteen thousand dollars. Michon, the pilot, gives no testimony concerning the holding of the skiff. It may be remarked here that Simon, together with several other witnesses, was under the impression that the engine had stopped entirely at the moment of the accident, and that in testifying he gave it as his opinion that the officers of the boat had done about as well as they could in the attempt to make the transfer, being unable to specify in what particular they were at fault. With regard to the testimony of Wright, it seems to us hardly likely, in view of the fact that he was so much engrossed in conversation with Miss Le Blanc immediately before the accident as not to observe other persons standing around him, and of the fact that, the instant after he had let go her hand, in saying good-night, she and two other young ladies were precipitated into the river, and this witness stood there as near, or nearer, to them than anyone else, whilst they struggled for their lives, and yet is unable to say who assisted either of them onto the boat, that he should be particularly relied on when he undertakes to say who was not present at the moment, or to testify, it being at night, and there ³⁶⁷ being a number of persons around him,

that the captain appeared upon the scene from the engine-room, rather than from any other place. His testimony, we think, is also open to criticism on other grounds. Being asked which of the officers he saw after the accident, he answers: "Captain Sweet" and the examination proceeds:

"Q. Where was he? A. Standing on the boat, about the middle of the boat, when I saw him.

"Q. What was he doing? A. Looking around for the girl, I suppose.

"Q. He was in the middle of the boat? A. Yes, sir.

"Q. You mean the steamboat? A. Yes, sir; he was looking across the boat.

"Q. Did you see Harrington? A. Yes, sir.

"Q. Where was he? A. On the side of the boat.

"Q. Which side? A. On the Calcasieu side, where the girl was drowned.

"Q. Near the head of the skiff? A. Yes.

"Q. Which way did Captain Sweet come from, when you saw him cross the boat? A. From the engine-room.

"Q. Engine-room? A. Yes, sir.

"Q. How long was that after the accident? A. Just after.

"Q. Right afterward? A. Yes. . . .

"Q. Did you see who pulled the girls out of the water? A. No, sir; I don't remember who pulled them out."

The witness had not stated that he saw Captain Sweet cross the boat, only that "he was looking across the boat," but he accepted the suggestion contained in the question which followed, and, after giving answers which fairly meant that, when he first saw Sweet after the accident, that officer was "in the middle of the boat," looking across the boat, or around the boat. "for the girl," as he supposes, he undertakes to say that he saw him coming from the engine-room. The testimony is irrational, and inconsistent with the facts. If the witness first saw Sweet in the middle of the boat, it was a mere guess whether he had come from the engine-room or elsewhere, but there was no time or occasion for him to have been in the middle of the boat, looking across for the girl. There was no doubt as to where "the girl" was and there is as little doubt that Sweet was among the first on the spot from which she had fallen, for he and other witnesses, on both sides, swear that he was; so that "right afterward" (referring to the accident) Sweet was not looking across the boat, but was assisting in pulling an-

other of his passengers out of the water, a part of the affair which entirely escaped the observation of the witness.

These circumstances, together with the difficulty which we encounter in endeavoring to understand why this party of two men and four young ladies, situated as they were, should have desired or attempted to leave the boat, upon which they had been traveling, without the ³⁶⁸ knowledge or assistance of any of its officers or employés, added to the fact that the testimony, which we have recapitulated, is positive and affirmative on the one side, and negative on the other, force us to the conclusion that the captain and the fireman of the boat were the persons who were in immediate charge of the matter of her transfer from the boat to the skiff when Miss Le Blanc lost her life. Undoubtedly, she might have been safely transferred, and might still have survived, notwithstanding that the boat was in motion, and notwithstanding that she received no warning of the extreme danger which would result in case the edge of the skiff, when she stepped in, should be caught under the guards. But the evidence establishes beyond question that, in making the transfer, under such conditions, she must necessarily have been subjected to danger; and it also establishes that although the peril was one which ought to have been, and was, known to the officers of the boat, they gave her no warning, but held the skiff into which she was invited in such a way that, when she put her weight upon it, the side nearest the boat was caught under the guards and she was precipitated into the water. There was, and could have been, no sufficient reason for making the transfer as it was made, since it is conceded that it was attended with a high degree of danger, from which it might have been relieved in part, if not wholly, by waiting until the boat had stopped; in which case, too, the probability of effecting a rescue would have been greater, since with a boat moving at the rate of even three miles an hour, a person falling into the water, at night, may be out of sight as well as out of reach before assistance can be secured, whilst it might well be otherwise if the boat were stationary. We are of opinion, therefore, that the means provided by the officers of the "Olive," for effecting the transfer of their passenger, Miss Le Blanc, were not commensurate with the danger to which she was subjected, and we fail to find anything in her conduct to relieve the owner of the boat from liability for the consequences.

"Reduced to the simplest form, the rule may be stated to be that the carrier is bound to exercise the strictest diligence in receiving a passenger, conveying him to his destination, and setting him down safely, that the means of conveyance employed and the circumstances of the case will permit": 5 Am. & Eng. Ency. of Law, 2d ed., 558. See, also, *Lehman v. Louisiana etc. R. R. Co.*, 37 La. Ann. 707; *Turner v. Vicksburg etc. R. R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 145, 44 Am. Rep. 419; *Peniston v. Chicago etc. R. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

³⁶⁹ This rule states the obligation of the contract entered into by the defendants when they undertook to carry Miss Le Blanc from Lake Arthur to the mouth of the Bayou Queue de Tortue. We know that the passenger was not set down safely at the place of destination, and the defendants have failed to show that it was through fault of hers, and not of theirs.

There is a broad difference, it may be remarked, between the obligation of a carrier to a passenger, and his obligation to a third person, complaining of a tort, the burden of proof, in the latter case, save where otherwise provided by statute, resting upon the complainant, to establish both the injury and the negligence which caused it. Such were the cases of *Deikman v. Morgan's etc. R. R. & S. Co.*, 40 La. Ann. 787, 5 South. 76, and some others, to which we have been referred by the counsel for the defendants. Whereas, it is sufficient for the passenger, suing on a contract for safe carriage, to establish the contract and to show that he has not been safely set down at his destination, to throw the burden of explanation on the carrier. It is for the carrier, and not the passenger, to prove what negligence, and whose, prevented the fulfillment of the contractual obligation of the carrier: *Julieu v. Steamboat "Wade Hampton"*, 27 La. Ann. 377; *Patton v. Pickles*, 50 La. Ann. 857, 24 South. 290; *Moses v. Louisville etc. R. R. Co.*, 39 La. Ann. 649, 4 Am. St. Rep. 231, 2 South. 567.

The amount of damages which should be allowed in cases of this character always presents a question of difficulty. The evidence shows that the plaintiffs were put to an expense of fifty dollars or more, in connection with the search for the remains of their daughter and the burial; and, beyond that, they claim nine hundred dollars, as the value to them, at the rate of fifteen dollars per month, of the services of the deceased,

from the day of her death for a period of five years, one thousand dollars as the value to them of the filial offices and attention of the deceased, five thousand dollars as the amount to which the deceased, herself, by reason of her suffering, was entitled at the moment of her death, and five thousand dollars as punitive damages.

The daughter whom the plaintiffs have lost was an active girl, full of life and spirits, and of great physical vigor, who assisted in the work which was required about their country home, and they might reasonably have expected a continuation of that assistance, and of the filial and kindly offices which the deceased, as an affectionate daughter, owed to her parents. The plaintiffs are also entitled to recover the amount ³⁷⁰ which the daughter was entitled to recover at the moment of her death. Without undertaking to attribute a specific amount to each of these elements of the claim presented, we are of opinion that a total of two thousand five hundred dollars should be allowed, and that the claim for punitive damages should be denied. There may be some doubt as to whether the suit should not have been brought by the husband alone, but the question has not been raised, and would have been of no practical importance if it had been. We shall not, therefore, undertake to pass on it, but will give judgment in favor of both plaintiffs. As to the defendants, it appears that the boat belonged to Daniel E. Sweet, and that Henry L. Sweet occupied the position of master and engineer. Under these circumstances, we find no reason for holding the latter liable.

For these reasons, it is ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of the plaintiffs, Theoville and Leonore Le Blanc, and against the defendant, Daniel E. Sweet, in the sum of two thousand five hundred dollars, with interest, as prayed for, and costs in both courts. It is further ordered and adjudged that in other respects the demands of the plaintiffs be rejected.

Rehearing refused.

A Common Carrier of Passengers must exercise the highest degree of care for their safety, and is answerable for the slightest negligence: *St. Louis etc. Ry. Co. v. Stewart*, 68 Ark. 606, 82 Am. St. Rep. 311, 61 S. W. 169; *McKeon v. Chicago etc. Ry. Co.*, 94 Wis. 477, 59 Am. St. Rep. 910, 69 N. W. 175; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 696, 68 Am. St. Rep. 723, 40 Atl. 645. And its duty is not ended with carrying a passenger from one point

to another, but it must set the passenger down safely, if in the exercise of the utmost care it can be done: *Evansville etc. R. R. Co. v. Athon*, 6 Ind. App. 295, 51 Am. St. Rep. 303, 33 N. E. 469. In case of injury to a passenger a presumption of negligence on the part of the carrier has often been indulged: *Springer v. Ford*, 189 Ill. 430, 82 Am. St. Rep. 464, 59 N. E. 953; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St. Rep. 685, 42 Atl. 729; *Steele v. Southern Ry.*, 55 S. C. 389, 74 Am. St. Rep. 756, 33 S. E. 509; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645, 68 Am. St. Rep. 723, and cases cited in the cross-reference note thereto. Compare *Spees v. Boggs*, 198 Pa. St. 112, 82 Am. St. Rep. 792, 47 Atl. 875; *Chicago St. Ry. Co. v. Rood*, 163 Ill. 477, 54 Am. St. Rep. 478, 45 N. E. 238. See the note on this subject to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495.

Actions for the Death of a human being are considered in the note to *Brown v. Railway Co.*, 70 Am. St. Rep. 669-687. The element and measure of damages in such cases are considered in the monographic note to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375-383. In an action by a parent for the death of a minor child the main element of damages is the probable value of the services of the deceased: *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 29 Am. St. Rep. 143, 30 Pac. 603; *Fox v. Oakland etc. St. Ry.*, 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25. The recovery may include burial expenses: *Southern Ry. Co. v. Covenia*, 100 Ga. 46, 62 Am. St. Rep. 312, 29 S. E. 219.

CLERC v. MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY.

[107 La. 370, 31 South. 886.]

CARRIERS OF PASSENGERS—Negligence.—While common carriers are not absolute insurers of passengers, it is an implied condition of railroad companies with each passenger that the latter shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the company. (pp. 324, 325.)

CARRIERS OF PASSENGERS—Negligence.—While a carrier of passengers is not an absolute insurer of the passenger's safety against all the accidents and vicissitudes of travel, he is an insurer against all risks caused or increased by the negligence of the carrier when the passenger is not at fault. The negligence of the carrier in carrying passengers includes his negligence in all the departments of his undertaking. (p. 325.)

CARRIERS OF PASSENGERS—Care Required of Passenger. While a carrier is held to very strict care, the passenger himself is not relieved of all obligation of taking care of his own safety, but he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence for his own safety. (p. 325.)

CARRIERS OF PASSENGERS—Test of Care Required of Passenger.—The standard by which to determine whether or not an adult passenger has failed to exercise the degree of care required of him is whether his conduct is that of a prudent, reasonable man, in possession of his ordinary senses and capabilities, placed in his situation. (p. 325.)

CARRIERS OF PASSENGERS—Care Required of.—A passenger on a railroad train has the right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation with its necessary incidents, and he is not to be deemed guilty of negligence, unless knowledge of a defect or peril is thrust upon him and he then fails to use ordinary care to avoid injury. (p. 326.)

CARRIERS OF PASSENGERS—Negligence.—A railroad company is not permitted to place a car on one of its tracks in the hands of persons who do not know or appreciate the danger of doing or not doing certain acts, which it is the duty of the persons having charge of the car to know, and escape liability for their negligent acts on the ground that the car was not under the control of the company. It is responsible for the negligence of those into whose hands it permitted the car to pass. (p. 328.)

CARRIERS OF PASSENGERS—Negligence.—It is negligence on the part of a railroad company to place a freight-car with opening side doors on a switch connecting with the main track, so near the junction that the door, when opened, closes the space between the switch and the track, and causes such open door to strike and injure the arm of a passenger slightly projecting from the sill of a car window of a passing train. For such negligence the railroad company is liable. (pp. 327, 331.)

CARRIERS OF PASSENGERS—Negligence—Injury to Projecting Arm of Passenger.—It is not negligence per se for a passenger to allow his arm to slightly project from the window-sill of the car in which he is seated, and if the projecting arm is injured through the sudden negligence of the railroad company which the passenger has no reason to anticipate, prepare for, or guard against, he is entitled to recover. (p. 330.)

CARRIERS OF PASSENGERS—Negligence—Burden of Proof. A railroad company cannot, by its own act or that of one for whose acts it is responsible, injure one of its passengers, and then throw upon him the burden of disproving contributory negligence. The carrier must establish affirmatively the acts on the part of the passenger which it claims bring him under the operation of the rule of contributory negligence barring him from the recovery of damages. (p. 331.)

Dart & Kernan, for the appellee.

Denegre, Blair & Denegre, for the appellant.

371 NICHOLLS, C. J. The plaintiff prayed for judgment against the defendant company for twenty-five thousand dollars, referring to it as Morgan's Louisiana and Texas Railroad Company. After alleging that it operated a line of steam railroad for the transportation of passengers and that he had purchased a ticket from the company and paid his fare, he averred that he was on the 3d of August, 1900, a passenger on car No. 318 of said company en route from New Orleans to Morgan City. That just after the train to which his car was attached had passed Gretna station, and while he was seated in the car, he

was suddenly struck on the right arm by an object which he afterward learned was the door and the iron bolt or ³⁷² fastening thereof attached to a refrigerator or freight car, also the property of defendant company, or being used by it and in its charge and care, custody and control, and lying on an adjacent track of the defendant company in close proximity to the track over which petitioner's train was moving or being carried. That said blow bruised, crushed and fractured petitioner's right arm, causing him great pain and suffering; that he was attended temporarily by fellow-passengers; that the train was stopped and petitioner was removed from said car to the Charity Hospital in New Orleans, where, on the same day, about noon, petitioner's said arm was amputated at the elbow—the said fracture and injury being such that amputation was necessary. That petitioner thereby lost forever the use of his right arm, reducing materially his capacity for making a living, besides mutilating and disfiguring his body. That at the time of said occurrence petitioner was a merchant in New Orleans, a member of the firm of Clerc Bros. & Co., in which firm he occupied the position of a traveling salesman, receiving in addition to his salary a share in the profits of said business. That his connection with said firm grew out of and was maintained chiefly by reason of his capacity as a traveling salesman, which occupation requires activity and physical ability to take care of one's self, especially in riding and driving in day and night through the country parishes of Louisiana, where much of petitioner's time was necessarily spent. That the loss of his right arm increases the cost or expenditure of traveling and had reduced his earning capacity. That petitioner lost seventy days of time from his business by reason of his said injury, during which period he was unable to earn his salary, and, on the contrary, was laid up, invalided and unable to work, and enduring constant physical and mental suffering; that he incurred expenses for physicians and medicines, and that while he had not lost his employment, his strength had been undermined, and his capacity to earn a living had been affected, as his usefulness to his copartners or other employers had been materially reduced by the loss of his arm as aforesaid. That defendant company was responsible to petitioner for his mutilation, pain and suffering, losses and injuries, because: 1. Petitioner was without fault or carelessness, and contributed in no way to said injury. That he was a passenger on the said car, in ³⁷³ charge of the

said company, in a place which he was entitled to consider safe, and had no warning or caution of the impending accident. That petitioner was entitled to safe carriage and protection from injury from anything in, on, or near the defendant's track, in its custody and control, or operated by it, under its care or placed by it, or permitted by it to be placed or to remain in a position where said thing could injure said defendant's passengers. That the car in which petitioner was seated and the car which caused the injury was the property of the defendant, or in its possession and operated and controlled by it; that the accident could not occur and would not have occurred but for the carelessness and gross negligence of the defendant or its servants, agents and employés, for whose acts it was responsible. 2. That the two cars in question were larger than usual, and there was no room between the two tracks for said cars to pass each other, particularly if the said freight-car had its door open or had anything projecting from the same. That the tracks at that point—namely, the track on which the petitioner's train was passing and the track upon which the freight-car was lying—were constructed in violation of the rules of the company as to distance between centers of tracks, and were, in any event, not placed sufficiently far from each other to provide against accidents of this kind. 3. That the freight-car in question had been lying within the yard limits of said defendant company with its door open or unsecured in the position which caused the injury for some hours, in full view of the defendant's employés, and was seen by, or should have been seen by, said employés and by the engineer and employés in charge of the train; that it was gross negligence and carelessness on the part of said employés not to have seen said car, or, having seen it, to have allowed it to remain in that position at a time when passenger trains were known to be approaching and passing, and it was gross negligence on the part of the engineer of the train to attempt to pass said obstruction under headway as he did. That for the mutilation, dismemberment, and disfigurement, his pain and sufferings, and his decreased ability to earn a living, petitioner assessed his damages at twenty-five thousand (\$25,000) dollars aforesaid.

In view of the premises, petitioner prayed that Morgan's Louisiana and Texas Railroad Company be cited, and after due proceedings had ³⁷⁴ that there be judgment in petitioner's favor condemning said defendant company to pay petitioner

the full sum of twenty-five thousand (\$25,000) dollars, with legal interest from date of judgment, and for trial by jury and for costs, and for all general and equitable relief.

The defendant, after stating that its real name was Morgan's Louisiana and Texas Railroad and Steamship Company, pleaded the general issue. Further answering, it specially denied that the accident referred to, or intended to be referred to, was due to any fault or negligence on its part, or on the part of any of its officers, agents or employés, and it averred that said accident was contributed to by plaintiff's negligence in unnecessarily and carelessly exposing his person to injury by allowing his arm to protrude out of the window of the passenger coach in which he was riding.

There is no dispute between the parties as to the fact that, at the time of the accident set out in plaintiff's petition, he was a passenger, seated near a window, in one of the coaches of a train of cars belonging to and operated by the defendant company. That while so seated, and the train being in motion, he was struck upon the arm by some object which injured him to such an extent as to necessitate its amputation. That the object which struck the plaintiff was either the door or a projecting hasp or bolt attached to the same of one of the side doors of a freight-car belonging to the defendant company, which was at rest upon a switch-track, also belonging to the defendant company, which connected with the main track upon which the train was moving. That this freight-car had been placed by defendant's employés upon this switch the evening before the accident, at the point which it occupied at the moment the accident occurred, and that point was so near to the main track that when the door of the freight-car was wide open, with the hasp or bolt extended to its utmost limit, the hasp would strike the side of a passenger coach as, in motion, it passed by. The defendant denies that the plaintiff was struck by the projection of the hasp or bolt of the door into the window of the passing passenger coach at the point where plaintiff was sitting. It concedes that the bolt struck the coach, but it contends that it did so at a point several inches below the sills of the row of passenger-car windows, as was shown by a defined line upon that car showing its line of contact.

375 In the brief filed on its behalf it is said: "It is conclusively shown by the witnesses that it was not the handle bar or hasp which struck plaintiff. If any additional evidence on this point

is desired it will be found in the evidence which the hasp itself recorded on the side of the passenger coach." Further on it is said: "Everything points to the conclusion that the door swung open or was shoved open as the train was passing, and that the hasp or bar folded back on its hinge and, so projecting a very short distance beyond the door, came in contact with car No. 318, and made the scratch mark above described, while the outer edge or face of the heavy door passed near enough to the side of the coach to come in contact with plaintiff's arm, which must have projected out of the window. . . . The conclusion is irresistible that the edge of the door struck plaintiff's hand. It passed within two or three inches of the side of the car and the blood stain on the door is just where contact with an arm resting on the sill, but extending out of the window, would take place." The motive of the defendant in insisting that it was the door and not the hasp which struck the plaintiff was that the form of the door would prevent its projecting inside the window-sill and would place the point at which the blow was inflicted outside of the line of the side of the passenger coach. That plaintiff was struck either by the door or the hasp of the door of the freight-car is beyond question.

The defendant denies that the person who threw open the door of the freight-car was an employé of the company. He maintains that if any employé had thrown the door open, it would have been in violation of his duty and the rules of the company. He urges that the freight-car was loaded with moss and consigned to one Hepting, and had been turned over to Hepting for the unloading of the moss and the company was not responsible for Hepting's acts.

It will be well to refer to the law governing generally this class of cases before making special application of it to the case immediately before us. We think it is very generally recognized that, for the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business.

While common carriers are not absolute insurers of passengers, yet as declared by this court in *Black v. Carrollton R. R. Co.*, 10 La. Ann. 38, 63 Am. Dec. 586: "It is an implied condition of railroad companies with each ³⁷⁶ passenger that the

latter shall not be put in jeopardy of life or limb by any fault, even the slightest, of the servants of the company."

In *Grand Rapids etc. R. R. Co. v. Boyd*, 65 Ind. 526, the court said: "A common carrier of passengers is not an insurer of the passengers' safety against all the accidents and vicissitudes of travel, but it is an insurer against all risks caused or increased by the negligence of the carrier where the passenger is not at fault. The negligence of a common carrier in carrying the passengers includes his negligence in all the departments of his undertaking, the condition of the road, the character of the machinery, the quality of the cars, the insufficiency of the equipments, the skill and conduct of the agents and employés, in everything indeed, necessary to the safety of the passenger when he himself is not at fault." While the carrier is held to very strict care, the passenger himself is not relieved of all obligation of taking care of his own safety, but, "unlike the carrier," he need not exercise the highest degree of care. He is bound to exercise only ordinary care and prudence to preserve himself from injury: *Fetter on Carrier of Passengers*, sec. 28; *Mackoy v. Missouri Pac. Ry. Co.*, 18 Fed. 236; *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Keokuk North Line Packet Co. v. True*, 88 Ill. 608; *Blond v. Southern Pac. R. R. Co.*, 65 Cal. 626, 4 Pac. 672.

The standard by which to determine whether or not a normal adult passenger has failed to exercise the degree of care is, whether his conduct is that of a prudent, reasonable man, in possession of his ordinary senses and capacities placed in his situation: *Fetter on Carrier of Passengers*, sec. 128; *Simms v. South Carolina Ry. Co.*, 27 S. C. 268, 3 S. E. 301. It has been held that "whether or not the act of a person is negligent depends upon whether or not a person of [ordinary prudence] would have done or omitted to do the same thing": *Galloway v. Chicago etc. Ry. Co.*, 87 Iowa, 458, 54 N. W. 447. The test of the liability of one to a charge of contributory negligence is whether a prudent person, in the same situation, and having the knowledge possessed by the one in question, would do the alleged negligent act: *Texas etc. Ry. Co. v. Best*, 66 Tex. 116, 18 S. W. 224. See, also, *Curtis v. Detroit etc. R. R. Co.*, 27 Wis. 158.

"The passenger on a railroad train has the right to confidently rely on the care and watchfulness of the carrier to make all things safe for his transportation with its necessary in-

cidents. While passively submitting himself to the carrier's care during the journey . . . ³⁷⁷ and he is not to be deemed guilty of negligence, unless knowledge of a defect or peril is thrust upon him and he then fails to use ordinary care to avoid injury." This right has to be exercised within reasonable limits. It stops where the situation is such that the exercise of the right in a particular case would relieve him from what, under the circumstances of that cause, would have thrown upon him the obligation of taking affirmatively legal care of himself in the premises. In the case of *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 145, 44 Am. Rep. 419, this court, referring to the defendant, said: "As a carrier of passengers, it is elementary that defendant's duty was to exercise diligence, skill, care and foresight to carry them safely: *Pennsylvania Co. v. Roy*, 102 U. S. 451. It was bound to know that its passengers, in common with those on other street railways, were in the habit of riding with their arms resting on the window-sills and projecting outside of the cars; that under the usual conditions of construction of parallel tracks in the city, this practice was free from danger of collision with passing cars, on their respective tracks; that the width between its own tracks at this curve was exceptionally narrow; that the car No. 4 used by it was exceptionally wide; that such car in running over that curve was liable to meet another car; that in such meeting they would, under conditions perfectly probable, pass each other so closely as, if not to collide, to come very near touching; that in such event a passenger in either car occupying the position shown to be very commonly occupied would inevitably be injured. Knowing these things, a reasonable care for the safety of others would have dictated the duty of using precautions to avoid the danger." Quoting, the court said: "As well said by an able judge, 'when we are engaged in an act which the surrounding circumstances indicate may be dangerous to others, and when the event whose occurrence is necessary to make an act injurious is one which we can readily see, may occur under the circumstances and unite with the act to commit the injury, we are culpable if we do not take all the care which prudent circumspection would suggest to avoid the injury': *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664."

The court decreed the defendant guilty of "negligence," as defined by itself in its decision. It then proceeded to consider

whether the plaintiff was guilty of contributory negligence, saying: "The sole negligence charged in his act in sitting as he did with his arm resting on the window and his elbow projecting out of the car. ³⁷⁸ Applying the principles already enunciated to the facts stated, we are of the opinion that there is a complete want of causal connection between the act and the injury. . . . It seems to us manifest under the circumstances of this case, that no ordinary circumstances or foresight would have suggested to the most cautious person situated as plaintiff was the slightest probability of danger from the meeting of a car on a parallel track. Seeing a car approaching he would have been perfectly justified (according to all common experience) in diverting his attention and resting in the perfect confidence that it would pass without touching him."

If the car had jumped the track, and had thus collided with the exposed arm of plaintiff, a different question would be presented. Quoad such a contingency, the act of plaintiff might have been judicially negligent. A prudent man might well foresee the possibility of such an occurrence and might well be held to have taken upon himself the risk of such a peril. But, viewing the particular damage here suffered concretely, Mr. Wharton's question, "Was it an ordinary natural sequence from the negligence?" must be answered in the negative.

In *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758, the court said: "It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open it is liable to extend slightly outside. This, we suppose, is a common habit. There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so to accommodate the motion of the train. Passengers know this and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in order and prudence."

Coming now to the case before the court, we are of the opinion that the defendant company did not comply, as a common carrier, with its duty to the passengers on its moving train, when it placed or allowed the loaded freight-car, with its

wide doors and bolts, to be placed as it was on the switch connecting with the track, on which it was, and in permitting that car, after it had been placed where it was, to go into the possession of a person other than one of its own employés to be by him unloaded. It was unjustifiable in the company to place one of its ³⁷⁹ cars, occupying as dangerous a place, in the hands of an irresponsible party. So far from escaping liability by reason of the fact that the car was in the possession and under the control of Hepting, that very fact itself was an act of imprudence, carelessness and negligence. A railroad company cannot be permitted to place a car on one of its tracks in the hands of parties who do not know or appreciate the danger of doing or not doing certain acts, which it was the duty of the party having control or charge of the car to know, and escape liability for his negligent acts on the ground that the car was not under its control, and it is responsible for the faults of those into whose hands it permitted the car to pass. This freight-car was on the switch so near the junction that its door when opened closed the intervening space between the switch and the main track. To open the door of a car so placed, when a passenger train is passing, is more than carelessness and passive negligence. It is a positive, active violation of the company contract. The defendant company could not, with impunity, throw a door open across the intervening space, taking the chance of its not hitting someone sitting in the passing car. On the other hand, the passengers in the car had the right to assume that they would be protected from any injury to themselves from the operation of any force thrown actively against them by parties for whom the company would be responsible. In this case it is not claimed that the plaintiff threw his hand or arm out of the car, and in so doing struck some object on the outside.

On defendant's theory of the case, the car on which the plaintiff was a passenger was moving toward the door and the door was moving toward the car at the time of the accident, while plaintiff himself was passive. We do not think that the plaintiff by any act of his estopped himself from recovering damages for the injury.

What did the plaintiff do which has cut him off from his action? The defendant says if it was guilty of negligence, so also was the plaintiff guilty of negligence. But is this true? At the utmost, the plaintiff inadvertently or forgetfully per-

mitted his elbow to project somewhat beyond the outer edge of the sill. If in point of fact the arm was projected, it does not appear how far beyond the sill it was so projected, nor for how long a time nor from what cause. It can scarcely be claimed that a passenger on a train should be constantly on the alert and on guard at every moment of his trip, to see that his arm does not pass a hair's breadth beyond the outer line of the sill, that he should watch every movement of his body, lest, perchance, in turning or stooping, ³⁸⁰ his arm should pass a little beyond limits. Such requirement at his hands would be utterly unreasonable. That a passenger might be guilty of negligence on some particular occasion by projecting his arm beyond the outer line of the car, so as to bar recovery of damages received as the result of that act, is, beyond question, true, but this barring of the remedy would depend upon the facts and circumstances of the case. Inadvertence, inattention, or forgetfulness are not, per se, "negligence." The time, the cause, the place, all the circumstances connected with the inadvertence, the forgetfulness, the inattention, are to be considered before they can be held to be of character such, as by reason of them, another person should be screened from liability and protected from the effects of an established tort. Unless the act itself in respect to which inadvertence or forgetfulness or inattention is charged to have been committed is negligence, the inadvertence or forgetfulness cannot be negligence.

What is negligence? And what is contributory negligence? This court has itself, in the case of *Summers*, in the 34th Annual, given a definition of the word. Several other definitions will be found in *Fetter on Carrier of Passengers*, section 3. The definition of this court referred to is as follows: "Judicial negligence is the inadvertent omission to do something which it would be the legal duty of a prudent and reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, to do, or the inadvertently doing something which it would be the legal duty of a prudent and reasonable man not to do, such act or omission being on the part of a responsible human being, and being such as in ordinary natural sequence immediately results in the injury complained of."

"This definition, though perhaps redundant, includes unequivocally all essentials and excludes acts not properly within the domain of negligence. It excludes offenses or intentional

wrongs. It excludes mere moral duties. It excludes irresponsible persons, of whom various classes are mentioned by Mr. Wharton. And it excludes all acts or omissions which, though they may be negligent, with reference to certain relations or contingencies, have no causal connection with the injury complained of."

Assuming that the plaintiff did, in point of fact, project his arm to some extent beyond the window-sill of the window at which he was seated, was his doing so, under the circumstances in which this was ³⁸¹ done, and in view of the exact situation, "negligence"? We think not. The company's road is not a new one; it has been in operation for years; the situation of its tracks and the constructions along its lines are well known. No accident is shown or asserted to have occurred upon it by reason of any passenger having projected his arm beyond the window-sill, and there certainly would have been accidents had that fact of itself been attendant with danger, as it is a matter of common knowledge that passengers are constantly doing this with no injurious results. The plaintiff had no reason to anticipate danger of injury to himself or to anyone else by permitting his arm to pass beyond the sill. It is not pretended that there ever had been or was anything on the line of the road which would have made it at all dangerous for plaintiff's arm to have rested precisely where it was, had not the special circumstances arisen from and out of which this accident occurred. They would not have occurred but for defendant's sudden negligence, and the plaintiff had no reason to anticipate, prepare for and guard against such negligence. If plaintiff had had reason to anticipate that which happened, a very different case would have been presented. Defendant's counsel urges that injury in the Summers case was one in which a street railway and not a steam railroad was the defendant. It may be, and doubtless is, true that the legal situation in a case of this kind may be varied by the fact that the company involved is a railroad instead of a railway company. If there be a difference, we will give heed to and act upon it when it is shown in any particular case, but we cannot arbitrarily declare that, as a matter of law, passengers in a railroad car are prohibited from projecting, to the least extent, their arms beyond the side of the coaches, while the fact is open to inquiry in the case of a street railway company. In the Summers case, the court said "that in determining what constitutes negligence, precisely the

same rules must be applied to the acts of defendant charged with negligence as to the acts of plaintiff charged with contributory negligence."

We have repeatedly relieved defendants from the charge of negligence where the act done was one which the party committing it had no reasonable ground to know or believe, or could not reasonably be held to foresee in the light of attending circumstances, and which he did not know, or have reasonable grounds to know, would carry with it injury as its natural and probable sequence.

³⁸² Mere temporary inadvertence on the part of a plaintiff, under such conditions and in reference to a matter of that kind, would not be contributory negligence, barring recovery for damages. We deal with this matter not from the standpoint of comparative negligence, but from that of absence of negligence in its legal sense on the part of the plaintiff.

If the arm of the plaintiff projected beyond the window-sill, as defendant says it did, it does not show how far it projected, or for how long a time it did so. It may have been there for only a second of time, in his act of moving or turning. In *Patton v. Pickles*, 50 La. Ann. 864, 24 South. 290, referring to the relations between a common carrier and its passengers, we said: "The contract between the parties is one which from time immemorial has imposed upon the obligor exceptionally severe obligations. Safe carriage is not merely an incident of the contract, but it is its very direct object." We do not think that a railroad company can, by its own act or that of one for whose acts it is responsible itself, injure one of its passengers, and then throw upon him the obligation of disproving contributory negligence. In such a case the carrier must establish affirmatively the acts on the part of the passenger which it claims bring him under the operation of the rule of contributory negligence, barring him from recovery of damages: *Kennon v. Vicksburg etc. R. R. Co.*, 51 La. Ann. 1604, 26 South. 406. The views herein expressed are substantially held in *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 145, 44 Am. Rep. 419, *Lampkin v. McCormick*, 105 La. 418, 83 Am. St. Rep. 245, 29 South. 952, and *Kird v. New Orleans etc. R. R. Co.*, 105 La. 226, 29 South. 729. See *Chaffee v. Boston etc. R. R. Corp.*, 104 Mass. 108; *Hempenstall v. New York Cent. etc. Co.*, 82 Hun, 285, 31 N. Y. Supp. 479; *Archer v. New York etc. R. R. Co.*, 106 N. Y. 589, 13 N. E. 318; *Fetter on Carrier of Passengers*, secs. 127, 130, 131.

We think the judgment is for too large an amount. It is hereby reduced and amended to seven thousand five hundred dollars, and, as so amended and reduced, it is hereby affirmed.

A Common Carrier of Passengers must exercise the highest degree of care for their safety, and is answerable for the slightest negligence. In case of injury to them, the cases are numerous holding that a presumption of negligence arises on the part of the carrier: *Le Blanc v. Sweet*, 107 La. 355, 31 South. 766, ante, p. 303, and cases cited in the cross-reference note thereto. Passengers, on the other hand, are under an obligation to act with prudence, and they cannot recover for injuries brought about by their own negligence: *Weber v. Kansas City etc. Ry. Co.*, 100 Mo. 194, 18 Am. St. Rep. 541, 12 S. W. 804, 13 S. W. 587; *Neff v. Harrisburg Traction Co.*, 192 Pa. St. 501, 73 Am. St. Rep. 825, 43 Atl. 1020. The carrier is not an insurer of their safety: *Hite v. Metropolitan St. Ry. Co.*, 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; *Jammison v. Chesapeake etc. Ry. Co.*, 92 Va. 327, 53 Am. St. Rep. 813, 23 S. E. 758.

A Passenger Resting His Arm on the sill of the open window of a car, with his elbow slightly projecting outside, is not negligence per se: *Moakler v. Willamette etc. Ry. Co.*, 18 Or. 189, 17 Am. St. Rep. 717, 22 Pac. 948; *Spencer v. Milwaukee etc. R. R. Co.*, 17 Wis. 487, 84 Am. Dec. 758; *Louisville etc. R. R. Co. v. Lickings*, 5 Bush, 1, 96 Am. Dec. 320. Compare *Georgia Pac. Ry. Co. v. Underwood*, 90 Ala. 49, 24 Am. St. Rep. 756, 8 South. 116; *Todd v. Old Colony etc. R. R. Co.*, 3 Allen, 18, 80 Am. Dec. 49.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
MAINE.

STATE v. CONWELL.

[96 Me. 172, 51 Atl. 873.]

SEARCH-WARRANTS—Issue on Sunday.—The fact that a search and seizure warrant is issued on Sunday does not render it invalid. (p. 333.)

SEARCH-WARRANT.—Act of Magistrate in issuing a search-warrant is ministerial and not judicial. (p. 334.)

R. T. Whitehouse, county attorney, for the state.

D. A. Meaher, for the respondent.

172 **POWERS, J.** This was a search and seizure warrant issued under Revised Statutes, chapter 27, section 40, before the enactment of chapter 201 of the Public Laws of 1901. The respondent excepts to the overruling of his demurrer, and the only question involved is whether the fact that the warrant was issued upon the Lord's day renders it invalid.

There is no statute in this state which declares such a warrant void. Works of necessity are expressly excepted from the prohibition against labor and business contained in Revised Statutes, chapter 124, section 20. Whatever is necessary to prevent crime and apprehend persons charged with its commission is within that exception: *Keith v. Tuttle*, **173** 28 Me. 326. Whether the issuing of a warrant in any case is a work of necessity is a question which cannot be raised upon demurrer. If it could, and if "the object of such legislation has been to secure to private citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day," as stated by Mr. Justice Whitehouse in *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892, it is difficult to conceive of anything more conducive to that object than the

prevention of the illegal sale of intoxicating liquor; and it would seem a perversion of the spirit of the statute to hold that a violation of it which is so well calculated to make it effectual.

It is only the service of civil process on the Lord's day that is prohibited by the Revised Statutes, chapter 81, section 81. And the execution of a search-warrant on Sunday was valid at common law: *Wright v. Dressel*, 140 Mass. 147, 3 N. E. 6; *Pearce v. Atwood*, 13 Mass. 324. In the case last cited, Parker, C. J., in delivering the opinion of the court, states that warrants may also be issued upon that day, "for if the arrest is authorized by law, the order to make such arrest is lawful." The same considerations of necessity and public policy which will justify the arrest or search and seizure upon the Lord's day will equally justify the taking on that day of any preliminary steps necessary to make the arrest, or search and seizure.

The legality of search-warrants was first established by Lord Hale on the ground of public necessity, because without them felons and other malefactors would escape detection: 1 Chitty's Criminal Law, 64. The same ground would furnish a strong argument in favor of their legality when issued on Sunday, as a delay of one day would frequently allow the guilty party to escape.

By the common law Sunday is *dies non juridicus*, and all judicial proceedings upon that day are void, but ministerial acts could always be performed on that day: *Pearce v. Atwood*, 13 Mass. 324; *Johnson v. Day*, 17 Pick. 106.

The statute under which these proceedings were commenced (Rev. Stats., c. 27, sec. 40) declares that "if any person, competent to be a witness in civil suits, makes sworn complaint before any judge of a municipal or police court, or trial justice, . . . such magistrate shall issue ¹⁷⁴ his warrant." Here is nothing judicial to be done by the magistrate, nothing left to his judgment or discretion. The statute is mandatory, and the act of the magistrate ministerial. Mr. Justice Whitehouse in discussing this very question in *State v. Le Clair*, 86 Me. 522, 30 Atl. 7, says: "It might well be claimed that the act of the clerk in issuing the warrant in question was purely ministerial." While that case was decided upon another ground, yet we see no reason to dissent from the reasoning there employed, or the conclusion there reached upon this subject: See, also, *Commonwealth v. Clifford*, 8 Cush. 215.

Exceptions overruled. Judgment for the state.

Sunday.—*Ministerial Acts* may be performed on Sunday: *Hanover Fire Ins. Co. v. Shrader*, 89 Tex. 35, 59 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112; such as the issuance of an attachment: *Whipple v. Hill*, 36 Neb. 720, 38 Am. St. Rep. 742, 55 N. W. 227. Service of summons on Sunday is voidable, but not void: *Burke v. Interstate Sav. etc. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879. An indictment is not void because dated on Sunday: *Note to City of Parsons v. Lindsay*, 13 Am. St. Rep. 291.

DAY v. BOSTON AND MAINE RAILROAD.

[96 Me. 207, 52 Atl. 771.]

NEGLIGENCE at Railroad Crossing.—Looking straight ahead at or toward a railroad crossing is not sufficient precaution for any traveler who proposes to cross over to relieve him of contributory negligence. He must look both ways along the track to see what is approaching the crossing as well as what is on it. (p. 337.)

NEGLIGENCE at Railroad Crossing—Duty of Traveler.—A traveler upon the highway must look both ways and listen for trains at the very time he is approaching a railroad crossing, and an omission to do this, if unexplained, is contributory negligence per se, which bars an action for the collision, even though the railroad company was negligent. (p. 338.)

NEGLIGENCE—Contributory—Burden of Proof.—A person seeking to recover for the negligence of another must affirmatively prove his own freedom from contributory negligence. (p. 338.)

NEGLIGENCE—Burden of Proof—Death of Witness.—To recover for the death of a person caused by negligence, the plaintiff has the burden of proof to show that deceased was free from contributory negligence, and the fact that the witness by whom this could have been proved is dead does not change the rule so as to entitle the plaintiff to recover without such proof. (p. 338.)

VERDICT AGAINST EVIDENCE.—A verdict of a jury on matters of fact cannot be made the basis of a judgment if there is no evidence to support it, or when inferences are made contrary to all reason and logic. (p. 339.)

NEGLIGENCE, CONTRIBUTORY—Evidence.—In an action to recover for negligence at a railroad crossing, evidence that a hand-car passed over the crossing when a traveler on the highway, afterward injured at the crossing, was driving along parallel with the railroad and that the men on the hand-car saw such traveler, is not evidence that the latter noticed the hand-car, or that if he did notice it, that it influenced his subsequent conduct, or caused him to stop, look and listen for the approaching train so as to relieve him of contributory negligence in failing so to do. (p. 340.)

NEGLIGENCE at Railroad Crossing—Speed of Train.—The fact that a railroad train is approaching a crossing at much greater speed than is allowed by law does not diminish the duty of a traveler on the highway to use due care in approaching the crossing to avoid a collision. (pp. 340, 341.)

NEGLIGENCE at Railroad Crossing—Absence of Danger Signal.—A traveler upon the highway approaching a railroad crossing has no right to depend solely upon any signal from a passing train, and must, in the absence of such signal, still be on his guard and endeavor to ascertain by looking and listening, the actual fact whether or not a train is approaching. (p. 341.)

E. P. Spinney, for the plaintiff.

G. C. Yeaton, for the defendant.

213 EMERY, J. The evidence for the plaintiff shows the following: The plaintiff's intestate, Edwin Day, in the forenoon of a summer day, was driving alone in a hay-rack drawn by one horse along a village street toward a grade crossing of the street with the railroad tracks of the defendant company, in North Berwick. He was standing up next the front rail of the hay-rack as he was thus driving. When first seen by any of the witnesses, he was driving along Portland street nearly parallel with the railroad tracks. He then turned from Portland street into Wells street which led more directly to the crossing, and over it at an angle of forty-three and one-half degrees with the track. The distance from the turn into Wells street to the crossing was four hundred and seventy-one feet. He was "jogging along," as the plaintiff's witness described it, at a rate of about five miles an hour. He stopped momentarily some twenty feet from the crossing and then drove immediately upon the crossing, where he was struck and killed by a train of the defendant company, which had come along the track from the direction thus partially behind him. He was about thirty-five years of age, in the full possession of all the usual faculties, and was familiar with the crossing and the surroundings.

There is no evidence that in approaching the railroad crossing Mr. Day took any precautions whatever to ascertain whether a train was also then approaching the crossing from either direction. True, **214** he stopped momentarily some twenty feet from the crossing, but it does not appear that he looked or listened, or took any other measures to ascertain what might be approaching on the railroad tracks. There is no evidence for what purpose he stopped there. He may have stopped to look at something else than railroad or trains, or his horse may have stopped of its own volition without any act or will of Day's. We can only conjecture. There is no evidence. Nor can we assume, in the absence of evidence, that he did then look and listen for trains. On the contrary, it would seem that he could

not have looked and listened at that point for trains without seeing or hearing this train, which, according to the plaintiff's own theory of its speed, was then less than three hundred feet away. It is also true that a witness testified that as he was going from the crossing on Wells street he met Day at a point three or four rods from the crossing, and that Day then appeared to be looking "straight ahead toward the crossing, and not off to the right" (which would be toward the railroad). This does not tend to show requisite care and precaution on the part of Day. There was then, at that distance, no occasion for him to look at the crossing itself. Nothing then on, or passing, the crossing could endanger him at that distance. Looking straight ahead at the crossing would give him no information as to what might be on the tracks at a distance from the crossing and approaching it. Looking at or toward a railroad crossing is clearly not enough precaution for any traveler who proposes to pass over. He should look both ways along the tracks to see what is approaching the crossing as well as what is on it.

It is the firmly settled law of this state that in approaching a railroad crossing at grade the traveler upon the highway, to be in the exercise of ordinary prudence, must bear in mind that trains are liable to be approaching the crossing at that same time, and at any moment, from either direction; that the train cannot turn aside for him, and cannot be easily stopped to avoid him. He must, therefore, to comply with his duty to exercise ordinary care, be on the alert to ascertain by the use of his senses of sight and hearing, and by any other appropriate means, the approach of trains, and to seasonably avoid collision with them. He can usually avoid collision readily, easily ²¹⁵ and promptly, if he be properly careful and alert while approaching the crossing. In view of the obvious peril at grade crossings and of the obvious inability of the train to turn out or stop instantly, it has further been repeatedly held that care commensurate with the peril requires the traveler upon the highway to look and listen for trains at the very time he is approaching the crossing, and that an omission to take this ordinary precaution is, if unexplained, contributory negligence per se, as matter of law, and will bar an action for the collision even though the railroad company was negligent in the premises. He must bear in mind, what is of common knowledge, that railroad trains move much faster than the ordinary pace of a horse drawing a vehicle along the

highway, and hence must not rest content with an observation made at considerable distance from the crossing, especially if there be objects or circumstances to obstruct his vision or hearing at the more remote point. He must be mindful, must observe, look and listen, as he approaches close to the place of peril, the crossing: *Chase v. Maine Cent. R. R. Co.*, 78 Me. 346, 5 Atl. 771; *Allen v. Maine Cent. R. R. Co.*, 82 Me. 111, 19 Atl. 105; *Smith v. Maine Cent. R. R. Co.*, 87 Me. 339, 32 Atl. 967; *Romeo v. Boston etc. R. R. Co.*, 87 Me. 540, 33 Atl. 24; *Giberson v. Boston etc. R. R. Co.*, 89 Me. 337, 36 Atl. 400.

It is further the settled law of this state that it is incumbent upon a plaintiff suing to recover damages alleged to have resulted from the negligence of another party to affirmatively prove his own freedom from contributory negligence in the premises. There is no presumption that a plaintiff in such case was thus free from contributory negligence, though sometimes the circumstances may of themselves show that he was, as in the case of a passenger injured by the negligence of a railroad company, while sitting in his seat doing nothing. In the absence of affirmative evidence tending to show that the plaintiff, himself being an actor, exercised on his part the care and effort incumbent on him to avoid the injury, he cannot maintain his suit. That the only witness who could testify to facts showing such care is dead, and the plaintiff is thus left without the evidence, does not enable the plaintiff to recover without the evidence. In support of the foregoing proposition it is only necessary to cite the late case of *McLane* ²¹⁶ *v. Perkins*, 92 Me. 39, 42 Atl. 255, where the proposition is fully reviewed and affirmed.

In this case the plaintiff contends that the evidence shows circumstances and conditions which made it difficult for Mr. Day to see or hear the approaching train, or to obtain any other information of its nearness to the crossing. If such was the case, it was the duty of Mr. Day to make all the more effort to ascertain the truth; but the case is barren of evidence that he made any effort whatever, great or small. The difficulty of seeing and hearing the train is therefore immaterial, since it is not claimed that it was impossible with any effort to know of the train's approach. It is the absence of evidence of any, even the smallest, effort on the part of Day, not his inability to see or hear with reasonable effort, which convicts him of contributory negligence.

The foregoing statement of the law and the evidence would seem to require a judgment for the defendant, notwithstanding the verdict of the jury in favor of the plaintiff. A verdict of a jury on matters of fact, and within even their exclusive province, cannot be the basis of a judgment where there is no evidence to support it, or when they have made inferences contrary to all reason and logic. In this case Mr. Day, as he approached the crossing, had a plain duty long and clearly defined by law, failing to perform which he or his representative could not sustain an action. There is no evidence that he did that duty or any part of it, and such a fact must be established by evidence and not assumed.

But the plaintiff contends in this case that some of the defendant company's servants so conducted during Mr. Day's approach to the crossing as to assure him that no train was approaching so near as to endanger him in attempting the crossing when he did. This assurance was given, the plaintiff says, by some of the sectionmen propelling a hand-car along the track over the crossing toward the direction from which the train was coming. The argument is that Mr. Day, seeing this hand-car and knowing that it must go nearly one thousand feet to reach a switch or sidetrack where it could let a train by, was thereby assured that no train from that direction would reach the crossing until that one thousand feet had been first covered by the ²¹⁷ hand-car and then by the train, which would have allowed him ample time for crossing safely; and that a jury might reasonably find that it was not negligence in Mr. Day to rely on that assurance and cease his own personal outlook for the approach of such a train at such a time as would endanger him. Hooper v. Boston etc. R. R. Co., 81 Me. 260, 17 Atl. 64, and York v. Maine Cent. R. R. Co., 84 Me. 117, 24 Atl. 790, are cited.

It appears in evidence that the defendant company's sectionmen did propel a hand-car along the track over the crossing in the direction named, but this was while Mr. Day was on Portland street some fifty feet from the turn into Wells street, and while he was traveling parallel with the railroad and not toward it. The distance from the crossing on Wells street to its junction with Portland street was four hundred and seventy-one feet. The sectionmen, or some of them, as they passed the crossing noticed Mr. Day and his team at the locality named, on Portland street near Wells street.

Unfortunately for this contention there is no evidence that Mr. Day noticed this hand-car, although it was within the range of his vision. There are no circumstances tending to show that he noticed it, or, if he did notice it, that it in the least influenced his after conduct. He was on Portland street at the time, traveling parallel with the railroad, and, if he faced as he was driving, was not facing the car or the track. His momentary stop some twenty feet from the crossing does not tend to show that he noticed the car. That stop was some minute or two after the car had passed and after the section-men on the car saw him.

Of course, it is possible that he noticed the hand-car. Indeed, it may be quantitatively probable that he did. Quantitative probability, however, is only the greater chance. It is not proof, nor even probative evidence, of the proposition to be proved. That in one throw of dice there is a quantitative probability, or greater chance, that a less number of spots than sixes will fall uppermost is no evidence whatever that in a given throw such was the actual result. Without something more, the actual result of the throw would still be utterly unknown. The slightest real evidence that sixes did in fact fall uppermost would outweigh all the probability otherwise. ²¹⁸ Granting, therefore, the chances to be more numerous that the plaintiff's intestate did notice the hand-car than that he did not, we still have only the doctrine of chances. We are still without evidence tending to actual proof. However confidently one in his own affairs may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact, as a basis for a judgment of a court, he must adduce evidence other than a majority of chances.

The situation was very different from that in either of the cases cited. In each of those cases the traveler was directly at the crossing at the time of the event on the crossing. In the one case the gates were up when the traveler reached the gated crossing and remained up. In the other case the traveler was at the crossing, halted and waiting, as the train passed directly before his face. In this case at bar the event occurred when the traveler was five hundred feet distant from the crossing, traveling parallel with the railroad, and nothing appears in evidence or the situation that would force the event upon his attention as in the other cases.

For lack of evidence, even from circumstances, that Mr. Day in fact noticed the hand-car as it passed along the track and was influenced by it to cease further outlook, that episode does not suffice to show that Mr. Day took the requisite precautions, or was excused from taking them by any assurance of safety from the company's conduct. The whole evidence does not show either that he took the precaution or that he in fact relied upon assurances of safety.

The plaintiff calls attention to evidence that this crossing was in a compact part of the town where the speed of trains was limited by law to six miles an hour when passing the crossing, and that this train passed the crossing at a much greater rate of speed. She contends that Mr. Day could properly assume, and act upon the assumption, that the train was not moving more than the lawful rate of six miles an hour, and therefore if he could have safely crossed the track in front of a train moving only at that rate, she has shown that he was free from contributory negligence in crossing the track when he did. Unfortunately for this contention, also, there is no evidence that Mr. Day consciously saw or heard the train at all, or reasoned about ²¹⁹ its speed as compared with his own. So far as the evidence shows, he went upon the crossing entirely unmindful of what was approaching. Had he noticed the train it was his duty to note its actual rate of speed and take no chances of collision with it.

The plaintiff further calls attention to evidence that no bell was rung, no whistle was blown, and no other signal of approach was given by the train. She contends that the absence of all signals of approach was an assurance of safety. As to this contention, it has been repeatedly held that the traveler upon the highway must not depend solely upon any signal from the railroad company's servants, but must, in the absence of such signals, still be on his guard and endeavor to ascertain the actual fact whether or not a train be approaching: See cases cited above.

So far as now appears, the case is the too common one where the traveler upon the highway either took no adequate care to ascertain whether a train was approaching, or else, being aware of the approaching train, recklessly undertook to cross before it.

We find in the law and the evidence no foundation for this verdict, and it must be set aside.

Motion sustained. Verdict set aside.

Contributory Negligence.—*The Burden of Proving contributory negligence* on the part of the plaintiff is upon the defendant: *Alabama R. R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 South. 303; *Little Rock etc. Ry. Co. v. Leverett*, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. 50; *Pullman etc. Co. v. Adams*, 120 Ala. 581, 74 Am. St. Rep. 53, 24 South. 921; *Schmidt v. St. Louis R. R. Co.*, 149 Mo. 269, 73 Am. St. Rep. 380, 50 S. W. 921; though in some jurisdictions the burden is on the plaintiff to show that he was free from contributory negligence: *Wieland v. Delaware etc. Canal Co.*, 167 N. Y. 19, 82 Am. St. Rep. 707, 60 N. E. 234; *Bartram v. Sharon*, 71 Conn. 686, 71 Am. St. Rep. 225, 43 Atl. 143.

Railroads—Crossing Track.—It is the duty of one about to cross a railroad track to look and listen. It is presumed, however, that he exercises proper care and does look and listen. The burden is on the railroad company to show that he did not. He has a right to assume as he approaches the track, that the company will act with care, and give all reasonable and necessary signals of the coming of trains: *Weller v. Chicago etc. R. R. Co.*, 164 Mo. 180, 64 S. W. 141, 86 Am. St. Rep. 592, and cases cited in the cross-reference note thereto: *Smith v. Boston etc. R. R.*, 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596, and cases cited in the cross-reference note thereto. Compare *Pittsburgh etc. R. R. Co. v. Frazee*, 150 Ind. 576, 65 Am. St. Rep. 377, 50 N. E. 576.

THOMAS v. THOMAS.

[96 Me. 223, 52 Atl. 642.]

JURISDICTION—Service of Process on Nonresident.—If the defendant is a nonresident and only commorant within the state, and so described in the writ, a return of an officer showing only a constructive service is not sufficient to confer jurisdiction of his person. (pp. 343, 344.)

JURISDICTION.—Substituted or Constructive Service of process upon a defendant is a departure from the common law, and the authority for it must be strictly followed. (p. 343.)

JURISDICTION—Service of Process—Nonresidents.—Constructive service of process is inefficient to confer jurisdiction, if made upon persons temporarily residing within the state. (p. 343.)

D. N. Mortland, for the plaintiff.

C. E. and A. S. Littlefield, for the defendant.

223 FOGLER, J. This is an action of trover which comes to this court upon exceptions by the plaintiff to the order of the presiding justice, on motion of the defendant, dismissing the action for want of sufficient service. The writ is dated August 21, 1901, and commanded the officer "to attach the goods and estate of Mary E. Thomas of Philadelphia, in the state of Pennsylvania, and now commorant in South Thomaston in the county of Knox, to the value of five hundred dollars,

and summon the said defendant (if she may be found in your precinct) to appear before our justices of our supreme judicial court to be holden in Rockland within and for the county of Knox on the third Tuesday of September, A. D. 1901, to answer unto Edmund W. Thomas, executor." The return of the officer, deputy sheriff of Knox county, states that, "on August 23, A. D. 1901, by virtue of this writ I attached a chip, the property of the within named defendant, and on the twenty-third day of August, ²²⁴ A. D. 1901, I summoned the said defendant by leaving at her last and usual place of abode a summons for her appearance at court."

On the first day of the return term, the defendant appeared specially for the purpose of objecting to the service of the writ, but for no other purpose, and filed a motion in writing to dismiss the action for insufficiency of service. After a hearing thereon by the presiding justice, said motion was sustained and said action ordered dismissed, from which ruling and order the plaintiff excepts. By the exceptions and the motion, which is made a part of the exceptions, it appears that the defendant was a permanent resident of Philadelphia, and at the date of said writ, and at the time of service thereof she was commorant, together with her daughter and son in law, in the town of South Thomaston. The question is whether the service as stated by the officer in his return is sufficient to bring the defendant within the jurisdiction of this court. By the common law personal service was required in all actions purely in personam. In this state, and, it is presumed, in all the other states of the Union, provision is made by statute for substituted or constructive service upon parties resident in the state. Such substituted service is a departure from the common law and the authority for it must be strictly followed: *Settlemier v. Sullivan*, 97 U. S. 444; *Galpin v. Page*, 18 Wall. 320.

Our statute (Rev. Stats., c. 81, sec. 17) provides how writs may be served on residents, and declares that "a separate summons, in form by law prescribed, shall be delivered to the defendant or left at his dwelling-house or place of last and usual abode." Section 21 of the same chapter, providing for the service of writs on nonresidents, contains no provision for substituted or constructive service.

The obvious construction of these sections is that constructive service can only be made upon parties defendant resident within the limits of the state, and, therefore, within the jurisdiction of the court.

At the date of the service of the writ the defendant's permanent residence was in Pennsylvania, but she was then commorant in this state. Can she be regarded as a resident of the state so that substituted service could be made as provided by statute?

²²⁵ The learned counsel for the plaintiff contends that, as commorancy is "a residence temporary, or for a short time," a person commorant in a place is one having a residence for the time being in such place, and, if he resides at a given place, whether for a long or short period of time, he is a resident. We cannot sustain this contention. We think the word "resident" in the statute means one having a permanent residence in the state as distinguished from one who is merely temporarily within the limits of the state.

In *Pullen v. Monk*, 82 Me. 412, 19 Atl. 909, the court, in discussing the meaning of the word "commorant" contained in another statute, uses the following language: "It cannot be doubted that a man may be a resident in one place and commorant in another at the same time. The distinction is between a permanent and a temporary home. A commorancy may be all the residence a man has, but usually not. In Webster's dictionary commorancy is defined as meaning, in American law, 'residence temporarily or for a short time.' The term from its derivation from the Latin implies something less than a regular residence, such as a staying, a sojourning, and, more literally, a tarrying. It was to express these minor degrees of residence that the word got in vogue in our jurisdiction, though not often used."

And in *Gilman v. Inman*, 85 Me. 105, 26 Atl. 1049, the court, speaking of the same word, says: "The etymological signification implies an abiding or tarrying for some appreciable, though temporary, duration less than a permanent residence."

In *Ames v. Winsor*, 19 Pick. 247, the defendant was described in the writ as of Duxbury, but as commorant in Boston. The service was by leaving a summons at his last and usual place of abode in Boston. Under a statute providing for substituted service identical with that of this state, the court held the service insufficient and stayed all further proceedings in the case. It is there said: "The law proceeds on the supposition that, at a man's dwelling-house, or last and usual place of abode (for both must concur), there will be some person enjoying his confidence, careful of his interests and charged with

his concerns, who will give him actual notice," a reasoning adopted and declared in *Sanborn v. Stickney*, 69 Me. 343.

²²⁶ It is true, as pointed out by the plaintiff's counsel, that in *Ames v. Winsor*, 19 Pick. 247, the place of permanent residency and the place of commorancy were both in the same commonwealth. We perceive no difference in principle between such a case and a case where a defendant is commorant in a state other than that of his permanent residence.

The precise question here at issue was decided in *White v. Primm*, 36 Ill. 416. There the defendant was a resident of Illinois. At the date of the officer's return he was stopping for two or three weeks at a private boarding-house in St. Louis. It was held that service by leaving a copy at that boarding-house was insufficient, although the officer's return stated that he had served the precept "by leaving a copy at the usual place of abode of the defendant." In the opinion it is said: "But we are not prepared to recognize a doctrine so perilous to private rights as it would be to admit that the hotel or boarding-house, where a stranger is sojourning for a few days, is to be considered his 'usual place of abode' within the meaning of the statute": See, also, *Blythe v. Hinckley*, 84 Fed. 228; *Grant v. Dalliber*, 11 Conn. 234.

The counsel for the plaintiff further contends that, as the officer's return states that he left a summons at the defendant's place of last and usual abode, that statement must be regarded as conclusive of the fact. That contention might have force if the defendant had a place of last and usual abode within the officer's precinct.

But the case shows that the defendant had no such place of abode within the state, and this court could not obtain jurisdiction of the case by a constructive service. The construction to be given to the return most favorable to the plaintiff is that the summons was left at a place which the officer supposed or believed to be the place of the defendant's last and usual abode. We do not think that the officer's return can be held to rebut the truth, and establish as a fact that which did not exist. Nor do we think that there are admissions in the defendant's motion or exceptions which tend to give the court jurisdiction.

Exceptions overruled.

Process.—If *Constructive Service* of process is relied upon to sustain a judgment, there must have been a strict compliance with the provisions of the statute: *Coffin v. Bell*, 22 Nev. 169, 58 Am. St. Rep. 738, 37 Pac. 240.

Process.—*Personal Service on a Nonresident* temporarily within the jurisdiction of the court is valid: *Alley v. Caspari*, 80 Me. 234, 6 Am. St. Rep. 178, 14 Atl. 12; *Hinton v. Penn Mutual Life Ins. Co.*, 126 N. C. 18, 78 Am. St. Rep. 636, 35 S. E. 182; note to *De La Montanya v. De La Montanya*, 53 Am. St. Rep. 181. As to jurisdiction over him by publication of summons, see *Hambel v. Davis*, 89 Tex. 256, 59 Am. St. Rep. 46, 34 S. W. 439.

HARLOW v. BARTLETT.

[96 Me. 294, 52 Atl. 638.]

GARNISHMENT.—**Trustee Process, Though in Form of Action at Law**, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared, and become a party to the suit. (pp. 346, 347.)

GARNISHMENT.—**Equitable Considerations** must prevail as between plaintiff and defendant in trustee process, so far as the nature of the process will permit. (p. 347.)

ASSIGNMENTS.—**Equitable.**—**Any Order, Writing, or Act** which plainly makes an appropriation of a fund, constitutes an equitable assignment of that fund. (p. 348.)

ASSIGNMENTS.—**Equitable.**—An instrument in writing by which one person, "for value received," "agrees to pay" to another the amount due him from a city for services as fireman, addressed to the city treasurer and recorded in the city clerk's office, operates as an equitable assignment of the fund, and is sufficient to protect the rights of the assignee against a subsequent attaching creditor of the assignor. (p. 348.)

H. H. Patten, for the plaintiff.

F. J. Martin and H. M. Cook, for the defendant.

²⁹⁶ **WHITEHOUSE, J.** This is a trustee process in which the claimants, J. F. Woodman & Co., assert title to the fund disclosed by virtue of an instrument of the following tenor:

"Bangor, Oct. 15, 1900.

"To Henry O. Pierce, City Treasurer:

"For value received I agree to pay to J. F. Woodman & Co. what there may be due me now, and also the balance due me January 1, 1901, from the city of Bangor for services as fireman.

FRANK I. BARTLETT."

This instrument was duly recorded in the office of the city clerk of Bangor, October 16, 1900. The two services of the trustee writ were made December 14 and December 31, 1900, respectively. A process of this kind, though in form an action

at law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared as in this case and become a party to the suit: *Jenness v. Wharff*, 87 Me. 307, 32 Atl. 908. "As between the plaintiff and claimant equitable considerations must prevail so far as the nature of the process will admit": *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276.

In the case at bar it is not in controversy that at the time of the alleged assignment to the claimants the principal defendant was indebted to them in a sum equal to the amount disclosed by the trustee. There was, in fact, a valuable consideration for an assignment of the fund.

But the plaintiff contends that the paper of October 15, 1900, of ²⁹⁷ the tenor above given, by force of which the claimants seek to establish their right to the fund, is simply a promissory note which cannot under any principle of law operate as an assignment to the claimants.

It has been seen that the instrument is addressed to Henry O. Pierce, city treasurer, and that the defendant therein agrees to pay to the claimants the amount due "from the city of Bangor for services as fireman." The terms of the instrument itself conclusively negative the idea that it might have been intended as an ordinary promissory note. The direction of the paper to the city treasurer, the express mention of the particular fund which was to be paid to the claimants, and the omission to make the instrument negotiable in form, disclose an obvious intention on the part of the defendant to effectuate a transfer to the claimants of the entire balance of his salary as fireman for the city of Bangor for 1900, and to appropriate the amount to the payment of his indebtedness to them. That this was the mutual intention of the parties is also evidenced by the fact that the instrument was promptly entered for record in the city clerk's office in accordance with section 6, chapter 111 of the Revised Statutes, which requires an assignment of wages to be so recorded.

Under such circumstances it is clearly the duty of the court to allow the intention of the parties to this instrument to prevail, if this may be done consistently with the established principles of law and equity.

"It is an established doctrine that an equitable assignment of a specific fund in the hands of a third person creates an equitable property in such fund. . . . In order that the doctrine may apply and that there may be an equitable assignment

creating the equitable property there must be a specific fund, sum of money or debt actually existing or to become so in futuro, upon which the assignment may operate, and the agreement, direction for payment or order must be in effect an assignment of that fund, or of some definite portion of it": 3 Pomeroy's Equity Jurisprudence, sec. 1280; National Exchange Bank of Boston v. McLoon, 73 Me. 498, 40 Am. Rep. 388. In White v. Kilgore, 77 Me. 571, 1 Atl. 739, the opinion quotes with approval the language of Story's Equity Jurisprudence, section 1047, that "any order, writing or act which makes an appropriation of a fund amounts to an equitable assignment of that fund." In Garnsey v. Gardner, 49 Me. 167, the court held that the assignment of a debt might be made by parol, and might be inferred from the conduct and acts of the parties: See, also, Sprague v. Frankfort, 60 Me. 253; Simpson v. Bibber, 59 Me. 196. So in Bower v. Hadden Blue Store Co., 30 N. J. Eq. 171, an instrument saying "I hereby agree to assign," etc., was held to operate as an equitable assignment. In the opinion the court said: "Equity disregards mere form; if the right exists, even if it is not formally manifested, it will afford both remedy and relief. In equity no particular form is necessary; any writing, or even an act, which plainly makes an appropriation of the fund or property, will be esteemed an assignment": See, also, Walcott v. Richman, 94 Me. 364, 17 Atl. 901.

The instrument in the case at bar, in which the defendant "agrees to pay" to the claimants the amount due him from the city of Bangor for services as fireman, addressed to the city treasurer and recorded in the city clerk's office, may reasonably be deemed equivalent to a direction to that officer to pay to the claimants the balance due the defendant, and accordingly be held to operate as an equitable assignment to them of that particular fund. When duly recorded it was sufficient to protect the rights of the claimants against a subsequent attaching creditor.

Title of claimants sustained. Trustee discharged.

In *Meserve v. Nason*, 96 Me. 412, 52 Atl. 907, the court decided that in trustee process the person claiming the fund in the hands of the trustee under a prior assignment to him by the principal defendant, must prove a valuable consideration for such assignment in order to hold the fund against attaching creditors of the assignor. The court said: "The funds in question originally belonged to the defendant, and were by him 'intrusted to and deposited in the possession of'

the alleged trustee, and were there remaining when attached by the plaintiff through this trustee process. The burden of proof was, therefore, upon the claimant. He had to show by evidence a prior title to the fund, acquired through a transaction, not only valid in itself, but also valid against attaching creditors of the defendant. A mere voluntary assignment by the defendant to the claimant would not be valid against attaching creditors. A valuable consideration must be shown: *Thompson v. Reed*, 77 Me. 425, 1 Atl. 241; *Haynes v. Thompson*, 80 Me. 125, 13 Atl. 276."

Garnishment.—*An Order Given on a Debtor* for the payment to the person in whose favor the order is drawn of a debt then existing, or in potential existence, though not accepted, takes precedence over a subsequent garnishment of the same debt: *Merchants' etc. Nat. Bank v. Barnes*, 18 Mont. 335, 56 Am. St. Rep. 586, 45 Pac. 218.

SHAW v. HUMPHREY.

[96 Me. 397, 52 Atl. 798.]

SURETYSHIP.—*The Liability of Sureties upon Probate Bonds* is contingent only upon the failure of their principal to pay the amount with which he stands charged. The surety is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account. (p. 350.)

SURETIES—Right of Appeal.—A surety upon a probate bond has no right of appeal from a decree of the probate court allowing or disallowing the account filed by his principal, or by the principal's legal representative. (pp. 350, 351.)

J. A. and I. A. Locke, for the plaintiff.

G. E. Bird and W. M. Bradley, for the defendant.

398 WHITEHOUSE, J. This is a petition to the supreme court of probate for a rehearing upon a probate appeal. It comes to the law court on report.

The petitioner is the surviving surety upon a probate bond given by E. Dudley Freeman as trustee under the last will and testament of Cyrus F. Sargent. After the decease of Mr. Freeman, the defendant, John H. Humphrey, was appointed trustee to fill the vacancy caused by Mr. Freeman's death. Thomas L. Talbot was appointed administrator on the estate of Mr. Freeman, and in that capacity presented to the probate court the final account of Mr. Freeman as trustee under the Sargent will. After due notice and hearing the account was allowed by the judge of probate, including a mortgage from George W. Titcomb of Denver, Colorado, for three thousand dollars

with a commission thereon of ninety dollars. Subsequently the defendant Humphrey, as trustee, by permission duly obtained, entered in the supreme court of probate an appeal from the decree of the probate court below allowing this account. Due notice of the appeal was given to Mr. Talbot as administrator on the estate of Mr. Freeman, but no notice of it was served on the petitioner, as surety on Mr. Freeman's bond. Mr. Talbot, the administrator, and the defendant Humphrey, subsequently prepared a statement of facts relating to the unfortunate investment made by Mr. Freeman in the Titcomb mortgage, and agreed to submit the appeal to the court upon that statement for such judgment as ³⁹⁹ law and justice required, reserving to either party the right to except to rulings in matters of law. Thereupon, upon consideration of the facts stated and the documents on file, a decree was entered in the supreme court, reversing the decree appealed from as to the item of three thousand dollars and commission thereon growing out of the Titcomb mortgage, and disallowing those items, but affirming the decree in all other respects.

The estate of Mr. Freeman was rendered insolvent, and the administrator took no exceptions, nor does it appear that he was ever requested by the petitioner to take any exceptions to the decision of the justice who entered this amended decree disallowing the item of the Titcomb mortgage.

In this application for a rehearing the petitioner represents that he had no notice of the entry of this appeal in the supreme court, that the decree "was obtained by and through the accident, mistake or fraud of the said John H. Humphrey, trustee, and his irregular proceedings in obtaining said decree from the supreme court of probate," that the decree disallowing the item of \$3,000 represented by the Titcomb mortgage was erroneous, and that injustice will be done to the petitioner unless that item is allowed in the settlement of Mr. Freeman's account as trustee.

In the opinion of the court it is unnecessary to determine whether such a general allegation that the petitioner is aggrieved by fraud, accident and mistake on the part of the defendant, unaccompanied by any more specific statement of the grounds upon which the charge is based, would justify the consideration of such a petition addressed to the discretion of the court. For there are prior objections which upon the settled law of this state are conclusive against the granting of a rehearing upon a petition such as this now before the court.

The liability of a surety upon such a probate bond is only contingent upon the failure of his principal to pay the amount with which he may stand charged. The surety is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account. It has accordingly been repeatedly held by this court that a surety upon such a bond has no right of appeal from a decree of a judge ⁴⁰⁰ of probate allowing or disallowing the account filed by the principal on the bond, or by the principal's legal representative: *Woodbury v. Hammond*, 54 Me. 332; *Tuxbury's Appeal*, 67 Me. 267; *Judge of Probate v. Quimby*, 89 Me. 574, 36 Atl. 1049. In the latter case it is said in the opinion: "The sureties were fully and effectually represented in the probate court by their principal, or, in this case, by his representative, the administrator. They signed the bond for the protection of the estate and of all persons interested in it, against their principal. In signing it they in effect stipulated that their principal should abide and perform the decree of the court upon all questions between him and the estate within the court's jurisdiction. They did not stipulate for any opportunity to object to any proceedings. They intrusted the representation of their principal's rights and interests to the principal himself."

The propositions established by these decisions are necessarily decisive of the principal question presented by the petition now before the court. But it is a satisfaction to observe that a careful examination of the agreed statement of facts in the light of all the circumstances, and of the well-known principles of law and equity applicable to the investment of trust funds, fails to disclose any error in the decree of the supreme court of probate disallowing the item of the Titcomb mortgage in controversy.

Petition dismissed with one bill of costs for respondents.

Appeal—Who May.—Any party to an order or decree of a probate court may appeal therefrom: *Porter v. Porter*, 7 How. (Miss.) 106, 40 Am. Dec. 55. An appeal may be taken by anyone on whose interest such order or decree has a tendency to operate injuriously. But such person must show that he has an interest in the subject matter in the decision appealed from: *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626. An administrator cannot appeal from a decree of the probate judge authorizing an action on his bond: *Sherer v. Sherer*, 93 Me. 210, 74 Am. St. Rep. 339, 44 Atl. 899.

SMITH-GREEN COMPANY v. BIRD.

[96 Me. 425, 52 Atl. 910.]

SHIPPING—Rights of Part Owners—Contract to Surrender Control.—The right of a majority in interest of the owners of a vessel to control its management is charged with the duty to retain and exercise not only for the benefit of all the owners, but others whose property and lives may be involved, and an agreement to surrender such control permanently or indefinitely is inconsistent with the trust which the law implies and imposes, and is void as against public policy. (p. 353.)

SHIPPING—Rights of Part Owners.—Contracts for the Sale of Sailing Rights by a part owner of a vessel are not susceptible of specific enforcement, either by way of estoppel or by direct proceeding. (p. 354.)

L. C. Cornish, for the plaintiffs.

A. M. Spear, for the defendant.

⁴²⁵ PEABODY, J. This cause comes before the law court on report. It is a bill in equity brought by the plaintiffs, Smith-Green Company and James W. Bigelow, against Leslie M. Bird to recover the proportional part belonging to them of the earnings of the schooner ⁴²⁶ "James W. Bigelow," alleged to be in the hands of the defendant.

Said proportional part, as shown by the account filed by the defendant, is six hundred and fifty-five dollars and eleven cents. The defendant claims to retain this amount in part satisfaction of damages sustained by the breach of the written agreement between him and the plaintiffs, doing business then under the name of Bigelow & Smith. By this agreement Bigelow & Smith were to "sell the said Bird three-sixteenths of the schooner 'James W. Bigelow' for six thousand dollars, with the understanding it shall be a master's interest; that he shall sail said vessel as long as he desires on half shares." After specifying certain other rights and limitations the contract further provides, "that if said Bigelow & Smith dispose of their interest in said vessel while said Bird is master, it shall be sold subject to this agreement."

It appears that, in accordance with this agreement, the defendant procured the sale of three-sixteenths of the schooner to his friends, retaining a small share, one thirty-second, himself. These shares were understood by the purchasers to carry with them the beneficial interest granted to the defendant

under the terms of the agreement, and, as a consideration for such beneficial interest, the shares were purchased at a price beyond their market value. It further appears that the defendant, although he had sold his interest in the vessel, still claimed and exercised the privileges appertaining to 'the master's interest.'

The Smith-Green Company, one of the plaintiffs, succeeded to the interest of Smith, he having deceased, which it appears to have held subject to said agreement. Subsequently the plaintiffs sold their interest in the vessel with no notice to the purchasers, and the vessel was placed under another master.

If this written agreement was a valid contract and was in force at the time of the alienation of the plaintiff's interest in the vessel, the plaintiffs are liable for such damages as may have been sustained by the defendant by reason of the disposal of their interests in disregard of the agreement; and these damages, to an amount not exceeding six hundred and fifty-five dollars and eleven cents, may be allowed as an equitable setoff to the account due the plaintiffs.

⁴²⁷ The master's interest is technically recognized in maritime law and in the statutes of the United States, but it does not exist independently of an interest in the vessel, nor against the will of the majority in interest of the owners, unless "there is a valid written agreement subsisting by virtue of which such master would be entitled to possession." When the defendant sold his share in the vessel, and was superseded as master, his sailing rights were extinguished unless preserved by this agreement with the plaintiffs. It had been executed on his part by the purchase of three-sixteenths of the vessel, one thirty-second being taken in his own name and the rest in the name of friends; and he had paid, or caused to be paid, for the same an amount which included a sum in excess of the value of the shares for "a master's interest," to be held by him with the privileges of sailing the vessel as long as he desired on half shares. It was in terms broken by the plaintiffs by the unconditional sale of their interests as majority owners of the vessel.

The right of a majority in interest of the owners of a vessel to control its management is charged with the duty to retain and exercise it, not only for the benefit of all the owners, but others whose property and lives may be involved; and an agreement to surrender such control permanently or indefinitely is inconsistent with the trust which the law implies and imposes.

In *Rogers v. Sheerer*, 77 Me. 323. *Virgin, J.*, says: "There
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is strong reason and high authority for declaring such a contract void, as against public policy"; he assigns as such reason "the vast authority of a master of a vessel, the important nature of the trust imposed in him, the corresponding duty of exercising the utmost circumspection in his choice and appointment and the great importance that the exercise of this duty shall be by an unfettered judgment," and he cites as such authority Story on Partnership, sec. 432; Flanders on Shipping, sec. 370; Maclachlan on Shipping, 2d ed., sec. 123; Abbott's Merchant Shipping, Story & Perkins' ed., 136; Ward v. Ruckman, 36 N. Y. 26, 30, 93 Am. Dec. 479.

In *In re Schooner "Eliza B. Emory,"* 3 Fed. 241, it was held: "The part owner of a vessel is estopped, by an attempted sale of the sailing right for which he has received and taken consideration, from joining in an application for the removal, without cause, of the purchaser of ⁴²⁸ such sailing right." But this case was reversed on appeal (4 Fed. 342), and it was held by the appellate court: "A contract for the sale of the sailing right by a part owner of a vessel is not susceptible of specific enforcement either by way of estoppel or by a direct proceeding for that purpose."

This principle is recognized in analogous cases where an agreement of part of the stockholders of a corporation with one purchasing stock that he shall be continuously retained or elected treasurer is held void, as against public policy: *Guernsey v. Cook*, 120 Mass. 501; *Noyes v. Marsh*, 123 Mass. 286; *Wilbur v. Stoppel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847.

The agreement between the plaintiffs and defendant is, therefore, not available to the defendant to enforce recovery of damages. It rested in personal confidence only until the plaintiffs saw fit to avoid it, and then the rights of the parties were to be determined according to existing conditions, independent of any contract obligation.

This proceeding in equity is invoked by the plaintiffs. The defendant's answer accounting for the earnings of the vessel shows that the shares of the plaintiffs now in his hands amount to six hundred and fifty-five dollars and eleven cents, which the court will decree to them unless the defendant has equitable claims against them. We think he has no such claim. Curtis, in his *Rights and Duties of Merchant Seaman*, at page 164, quoted in *Ward v. Ruckman*, 36 N. Y. 26, 93 Am. Dec. 479, after citing authorities says: "From these evidences of the

maritime law it would seem that the owners have the right to remove the master, who is a part owner, at their own pleasure, paying him for his share of the vessel." But this rule was modified by section 4250 of the United States Statutes, and besides he had, before the alleged breach of agreement by the plaintiffs, ceased to be a part owner of the vessel.

He has lost the "master's interest" not alone by fault of the plaintiffs, but by his own act in selling his interest in the vessel, and is remediless under the contract which is void as against public policy. It does not appear that he was induced to purchase this interest by the fraudulent representations of the plaintiffs upon which he relied and by which he was misled, or was deceived by any concealment of material facts, and he must be presumed to have known that the ⁴²⁹ agreement was invalid, and that his possession and control of the vessel could be terminated at the pleasure of the majority in interest. The plaintiffs should, therefore, recover said sum of six hundred and fifty-five dollars and eleven cents and interest from the date of accounting, with costs.

Decree accordingly.

PART OWNERS OF VESSELS.*

I. Relation Inter Se.

- a. General Rule—Tenants in Common.
- b. Not Joint Tenants.
- c. Partnership.
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 - A. Under Maritime Codes Generally.
 - B. In England.
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*REFERENCES TO MONOGRAPHIC NOTES.

Law of part owners of ships: 88 Am. Dec. 361-368.
Liability of part owners of ships: 13 Am. Dec. 320.

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I. Relation Inter Se.

a. General Rule—Tenants in Common.—Lying at the base of the various principles which determine the rights and liabilities of part owners of vessels is the nature of the legal relation existing between them, and with reference to the common subject of their ownership. What little conflict there exists as to this is to be found among the text-writers rather than in the adjudicated cases. The latter are uniformly to the effect that where the title to a vessel is vested in several persons, the relation thus formed, unless affected by a special arrangement between the owners giving it another character, is that of a tenancy in common. Their rights and liabilities as between themselves, and the nature of their ownership in the vessel, are ordinarily those of tenants in common in any other species of personal property: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Hyer v. Caro*, 17 Fla. 332; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *Whipple v. Hall*, 14 La. Ann. 437; *Phillips v. Purington*, 15 Me. 425; *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Elder v. Larrabee*, 45 Me. 590, 71 Am. Dec. 567; *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782; *Milburn v. Guyther*, 8 Gill (Md.), 92, 50 Am. Dec. 681; *Lamb v. Durant*, 12 Mass. 54, 7 Am. Dec. 31; *Merrill v. Bartlett*, 6 Pick. 46; *Thorndike v. De Wolf*, 6 Pick. 120; *French v. Price*, 24 Pick. 13; *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507; *Sheehan v. Dalrymple*, 19 Mich. 239; *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167, 5 N. W. 57; *Williams v. Sheppard*, 13 N. J. L. 76; *Merritt v. Walsh*, 32 N. Y. 685; *Donnell v. Walsh*, 33 N. Y. 43, 88 Am. Dec. 361, affirming 19 Sup. Ct. Rep. (6 Bosw.) 621; *Williams v. Lawrence*, 47 N. Y. 462; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *Wright v. Marshall*, 3 Daly, 331; *Buckman v. Brett*, 22 How. Pr. 233; *Mumford v. Nicoll*, 20 Johns. 610; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Turner v. Burrows*, 8 Wend. 144; *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555; *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139; *Coursin's Appeal*, 79 Pa. St. 220; *Croasdale v. Von Boyneburk*, 195 Pa. St. 377, 46 Atl. 6; *Eudsor v. Simpson*, 12 Phila. 392; *The New Orleans*, 106 U. S. 13, 1 Sup. Ct. Rep. 90; *In re The Eliza B. Emory*, 3 Fed. 241; *Scull v. Raymond*, 18 Fed. 547; *The Daniel Kaine*, 35 Fed. 785; *Spedden v. Koenig*, 78 Fed. 504, 24 C. C. A. 189; *Revens v. Lewis*, 2 Paine, 202, Fed. Cas. No. 11,711; *Green v. Briggs*, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326; *Ex parte*

Leslie, 3 L. J. Bk. 4; Graves v. Sawcer, 2 Ld. Raym. 15, 1 Lev. 29, 1 Keb. 38; Ex parte Young, 2 Ves. & B. 242, 2 Rose, 78, note; 13 R. R. 73.

b. Not Joint Tenants.—Such is undoubtedly the true view and the one supported by the overwhelming weight of authority. In some of the books, expressions are to be found, however, which would seem to regard the relation of part ownership, when unexplained by any other circumstances, as amounting in some cases to a joint tenancy rather than a tenancy in common. Thus, in Maclachlan on the Law of Merchant Shipping, chapter 3, it is said: "If part owners hold in severalty distinct shares in a ship, with an undivided interest in the whole, they are tenants in common with each other of their respective shares; but if a ship, or shares therein, be vested in several persons jointly with unity of title and no distinction of interest, they are joint tenants of the property so held." Collyer, in his work on Partnership, section 809, sixth edition, asserts that if a vessel be conveyed to several persons at one time, and by one instrument, "they are more properly joint tenants, without benefit of survivorship." The author of Abbott on Shipping, in a note concerning which there has been considerable discussion, takes still a third view to the effect that "where the entire ship is granted to a number of persons generally, it is apprehended they become joint tenants at law, and that the rule, *Jus accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in a court of equity": Abbott on Shipping, 97, note.

The three views seem alike unsupported by the cases: Freeman on Cotenancy and Partition, sec. 379, note; although the view of part ownership taken by Mr. Collyer seems to differ from a tenancy in common rather in its description than in its effect. According to Story, the relation of part owners is always, in the absence of all positive stipulations to the contrary, that of tenants in common rather than of joint tenants, and "in this respect it will make no difference whether the title is acquired at one and the same time, by and under one and the same instrument, or whether it is acquired at different times and under different instruments": Story on Partnership, sec. 417. And contrary to the view taken by Abbott in the note above referred to, it is now quite generally admitted that both in law and in equity there is no right of survivorship among part owners merely by virtue of their relation as such. "This absence of the doctrine of survivorship in these cases," says Mr. Justice Story, "is a natural, if not a necessary, result of the doctrine that the *jus accrescendi* has no existence among merchants or in the business of commerce and navigation. A different doctrine, which should introduce into the maritime law the narrow doctrine of the common law as to joint tenancy and the right of survivorship would be fatal to the interests of commerce and overthrow the plain dictates of public policy. The whole course of commercial usage and opinion has settled the doctrine the other way; and, accordingly, upon the death of one

of the part owners, his executors and administrators become tenants in common of the ship with the survivors": Story on Partnership, sec. 417. To the same effect see *The King vs. Collector of Customs*, 2 Maule & S. 223; *Buckley v. Barber*, 6 Ex. 164, 1 Eng. L. & Eq. 506.

c. Partnership.

1. **General Rule—Not Implied from Part Ownership.**—The mere fact that several persons are part owners of one vessel does not, it is well settled, make such persons partners, nor the vessel partnership property. Partnership is not inferable from part ownership. If a partnership exist between part owners, it exists by virtue of some agreement, express or implied, and does not arise, and cannot be implied, from the fact that several persons own the vessel by a tenancy in common. Part ownership is, as is said by Chancellor Kent (3 Kent's Commentaries, 5th ed., 154), the general relation between shipowners, while partnership is an exception, and requires to be specially shown. In the absence, therefore, of some agreement between part owners by which they form themselves into a partnership, or of dealings by such owners, either between themselves or with third parties from which a partnership may be implied, the relation between them is that of tenants in common, and not of partners: *Jones v. Sims*, 6 Port. (Ala.) 138; *Donald v. Hewett*, 33 Ala. 534, 73 Am. Dec. 431; *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595; *David v. Eloi*, 4 La. 106; *Pickerell v. Fisk*, 11 La. Ann. 277; *Whipple v. Hill*, 14 La. Ann. 437; *Woods v. Pickett*, 30 La. Ann. 1095; *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782; *Milburn v. Guyther*, 8 Gill (Md.), 92, 50 Am. Dec. 681; *Lamb v. Durrant*, 12 Mass. 54, 7 Am. Dec. 31; *Thorndike v. De Wolf*, 23 Mass. (6 Pick.) 120; *Smith v. Butler*, 164 Mass. 37, 41 N. E. 60; *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507; *Sheehan v. Dalrymple*, 19 Mich. 239; *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167, 5 N. W. 57; *Williams v. Sheppard*, 13 N. J. L. 76; *Williams v. Lawrence*, 47 N. Y. 462; *Domme v. Walsh*, 6 Bosw. (N. Y.) 621; *Hopkins v. Forsyth*, 14 Pa. St. 34; *Coursin's Appeal*, 79 Pa. St. 220; *Adams v. Carroll*, 85 Pa. St. 209; *Croasdale v. Von Boyneburk*, 195 Pa. St. 377, 46 Atl. 6; *In re The Eliza B. Emory*, 3 Fed. 241; *The Ole Oleson*, 20 Fed. 384; *The Daniel Kaine*, 35 Fed. 785; *Spedden v. Koenig*, 78 Fed. 594, 24 C. C. A. 189; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Magrunder v. Bowie*, 2 Cranch C. C. 577, Fed. Cas. No. 8964; *Montell v. The Wm. H. Rutan*, Fed. Cas. No. 9724; *Revens v. Lewis*, 2 Paine, 202, Fed. Cas. No. 11,711; *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396; *Helme v. Smith*, 7 Bing. 709, 5 Moore & P. 744, 9 L. J. (O. S.) Com. P. 206.

2. **May Exist Between Co-owners.**—There is no doubt, either on principle or authority, that a vessel, like any other chattel, may be

made a subject of partnership property, or that part owners may, if they choose, assume the relation of partners. There is nothing in the nature of a vessel which should render it different in this respect from any other species of personal property, and if it be shown that it is owned and regarded by the parties as partnership property, it will be so treated by the courts: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Harding v. Foxcraft*, 6 Greenl. 76; *Phillips v. Purington*, 15 Me. 425; *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Bishop v. Edmiston*, 16 Abb. Pr. 466; *Mumford v. Nicoll*, 20 Johns. 611; *Lape v. Parwin*, 2 Disney (Ohio), 560, 4 Week. L. Gaz. 202; *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139; *Seabrook v. Rose*, 2 Hill Ch. (S. C.) 553; *The Larch*, 2 Curt. 427, Fed. Cas. No. 8085; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Brodie v. Haward*, 17 Com. B. 109, 25 L. J. Com. P. 57, 33 Eng. Law & Eq. 146, 1 Jur., N. S., 1209; *Doddington v. Hallett*, 1 Ves. Sr. 496.

3. What Constitutes.

A. In General.—The difficulty in this connection is not a result of any conflict as to these rules. The principle that part ownership is quite different from partnership, and that the latter is not inferable from the former standing alone is conceded upon all hands. Nor has any confusion arisen through a failure to recognize that a vessel may be the subject matter of a partnership, where it is plain that the part owners so regarded it. What diversity of decision exists is due to a diversity in the application of the principles to particular cases and the determination of what is necessary and what sufficient to establish a partnership in a particular case.

The existence of a partnership is, as we have seen, "the exception," and if relied upon must be specially shown. It may appear and grow out of an express agreement of the parties, or it may be implied from the nature and character of the business or adventure in which the part owners are engaged: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198.

B. Distinction Between Partnership in Vessel and in Its Employment.—The distinction which must here be observed, and one which, if applied to the cases, will explain much of the seeming conflict and contradiction among them, is the distinction between the relation of the part owners to the vessel itself and to the business in which the vessel is employed. Part owners of a ship may be tenants in common of the vessel, and yet may employ it in an adventure with reference to which they are partners. The vessel would not, in such case, become partnership property, while its earnings would undoubtedly be the result of a partnership venture, and properly regarded as partnership funds.

C. In Vessel.—The instances in which the vessel itself has been held to be partnership property are few. If a partnership owns a

moiety of a vessel, such share is, of course, partnership property, and may be disposed of as such by any partner: *Lamb v. Durant*, 12 Mass. 54, 7 Am. Dec. 31. See, also, *Ex parte Jones*, 4 Maule & S. 450. So a partnership may own the entire vessel as partnership property, and the rules of partnership generally will in such case control as to the right of one partner to mortgage or otherwise dispose of the vessel: *Patch v. Wheatland*, 8 Allen, 102. The mere fact that a vessel owned by several is employed in an enterprise for the common profit of all the owners, or under an agreement to run the ship on shares, does not make the part owners partners in their ownership of the vessel: *The Daniel Kaine*, 35 Fed. 785. Even where such an arrangement amounts to a partnership among the owners of the vessel as to its employment, only the use of the boat, and not the boat itself, is brought into the partnership. While partners in the use of the vessel, they remain part owners and tenants in common of the ship: *Violett v. Fairchild*, 6 La. Ann. 193; *Whipple v. Hill*, 14 La. Ann. 437; *Woods v. Pickett*, 30 La. Ann. 1095; and creditors of the partnership employing the boat have no preference over other creditors of the owners to be paid out of a fund received as insurance for the loss of the vessel, such proceeds not being a fund derived from the sale of partnership assets: *Whipple v. Hill*, 14 La. Ann. 437. A vessel bought by several persons does not become partnership property because it was purchased as a speculation and with a view to its resale rather than to its employment in trade: *Pickerell v. Fisk*, 11 La. Ann. 277. Where, on the other hand, a vessel is bought to enable its purchasers to carry out a partnership contract (viz., for carrying the mails), and is to be paid for in part from its earnings in the performance of the contract, it is partnership property, having been purchased, in part at least, by the use of partnership funds: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198. Compare, however, *Walton v. Butler*, 29 Beav. 428.

In *Doddington v. Hallet*, 1 Ves. Sr. 497, the facts were as follows: An agreement was entered into between several persons and one Hall, authorizing the latter to contract for the building of a ship for the service of the East India Company, and for fitting out, managing and victualing her, with an agreement to pay proportional shares, according to their interests. The part owners claimed against Hall's representatives a specific lien upon Hall's share, on account of disbursements for fitting up the ship made by plaintiffs in excess of their proportions. Lord Hardwicke held that the facts showed a partnership among the parties; that the ship was a subject of the partnership, and the other part owners were therefore entitled to their lien. "It must be admitted," said the Lord Chancellor, "the ship may be the subject of partnership as well as anything else, the use and earnings thereof being proper subject of trade, and the letting a ship to freight as much a trade as any other. Then it ap-

pears plainly to be a partnership among them, and the ship itself to be part of the subject thereof, which was to be let to the company, it being their method of trading. The foundation of this partnership stock is the ship itself, which must be employed, and the earnings and profits to arise." The case of *Doddington v. Hallet*, 1 Ves. Sr. 497, has been made the subject of a great deal of discussion and adverse criticism, and has in some cases been regarded as holding part owners to be partners in all cases. The better view of the case is, perhaps, that taken by Spencer, C. J., in *Mumford v. Nicoll*, 20 Johns. 611, 633: "Lord Hardwicke perfectly understood the distinction between a tenancy in common, such as owners of different shares in a ship have among themselves, and a joint tenancy, as between partners of the goods and stock in trade. He meant to decide, and did decide, that a subject which ordinarily may be held as a tenancy in common, may, by the acts of the parties, become to be held in joint tenancy. And the facts of the agreement to build the ship at their joint expense, in proportion to their shares, and the agreement to fit out, manage and victual her, for the service of the East India Company, formed, in his judgment, such a community of interest as to constitute that a partnership transaction in relation to those subjects, and thus a specific lien was acquired by those who contributed more than their share, against the share of the one who contributed less than his proportion." Whether the facts in *Doddington v. Hallet*, 1 Ves. Sr. 497, were sufficient to justify the conclusion that the ship was held as partnership property is, perhaps, questionable. With reference to the lien of one part owner upon the share of another for excess of disbursements, and the doctrine of *Doddington v. Hallet* in that connection, see post, II, g, 1, A.

In *Mumford v. Nicoll*, 20 Johns. 611, reversing 4 Johns. Ch. 522, a ship owned jointly by two persons was fitted out and sent on a circuitous trading voyage, and upon its arrival at Havana was sold by the captain and the proceeds remitted to one of the owners. Whether this sale was in accordance with original instructions, or was ordered by the owner who received the money, after knowledge of the bankruptcy of his co-owner, seems to have been a fact with reference to which the various judges who delivered opinions in the court of errors differed. The owner who had received the proceeds from the sale of the ship and cargo sought to hold it for amounts owed him by the co-owner on a partnership account in relation to the voyage. Chancellor Kent (4 Johns. Ch. 522) held that as to the earnings of the vessel in freight and cargo the co-owners were partners, but that the vessel was held by them as tenants in common, and on the money derived from its sale, therefore, neither co-owner had any lien for a balance due on the partnership account. This was reversed on appeal by a divided court, the majority of the court holding that the parties had constituted themselves partners as to the

proceeds from the sale of the ship, and that one who had expended more than his share had, in consequence of this relation, a lien upon such proceeds as a partnership fund for the amount due him from his co-owner on the partnership account.

D. In Employment of Vessel.—Partnerships among part owners with reference to the employment of the vessel are far more frequent than in its ownership. "It seems to be conceded that two part owners employing their ship in any adventure to the cost of which they jointly contribute, and in the loss and profit of which they are jointly to participate, become partners as to that adventure, and hold the proceeds thereof subject to the law of copartnership": Freeman on Cotenancy and Partition, sec. 379. Their relation as tenants in common of the vessel is entirely consistent with a partnership as to the business of the boat. In such a case their liabilities as to third persons incurred in the business of employing the vessel are partnership liabilities, and the earnings of the vessel are partnership funds: Jones v. Sims, 6 Port. (Ala.) 138; Jones v. Pitcher, 3 Stew. & P. (Ala.) 135; Allen v. Hawley, 6 Fla. 142, 63 Am. Dec. 198; Hyer v. Caro, 17 Fla. 332; First Nat. Bank v. Freeman, 47 Mich. 408, 11 N. W. 219; Merritt v. Walsh, 32 N. Y. 685; Domnel v. Walsh, 33 N. Y. 43, 88 Am. Dec. 361; Williams v. Lawrence, 47 N. Y. 462, affirming 53 Barb. 320; Mumford v. Nicoll, 20 Johns. 611; Nicoll v. Mumford, 4 Johns. Ch. 522; Lape v. Parwin, 2 Disn. (Ohio) 560, 4 Week. L. Gaz. 202; Eudsor v. Simpson, 12 Phila. 392; Green v. Briggs, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326; The Pongola, 73 L. T. 512, 8 Asp. M. C. 89. See, also, Ward v. Thompson, 22 How. (U. S.) 330. Compare, however, Croasdale v. Von Boyneburk, 195 Pa. St. 377, 46 Atl. 6.

In Louisiana the above rule is settled both by statute and judicial decision. Among the commercial partnerships provided for by the Civil Code of that state are such as are formed for the purpose of carrying personal property for hire in ships and other vessels: La. Civ. Code, 2796. Under this provision it has been uniformly held that where part owners of vessels are engaged in transporting goods for hire, as to liabilities incurred and business transacted in such transportation they are partners, each being liable in solido and the earnings following the general laws of partnership: David v. Eloi, 4 La. 106 (qualifying Kimball v. Blanc, 8 Mart. (N. S.) 386; Vigers v. Sainet, 13 La. 300; Lacaste v. Selleck, 1 La. Ann. 336; Shirley v. Steamer Bride, 5 La. Ann. 260; Violet v. Fairchild, 6 La. Ann. 193; Cooley v. Broad, 29 La. Ann. 345, 29 Am. Rep. 332; Woods v. Pickett, 30 La. Ann. 1095. The code provision has not, however, the effect of changing the general law so as to make the owners so employing the boat partners in their ownership of the vessel. The boat itself remains vested in the parties as tenants in common: Byrne v. Hooper, 2 Rob. (La.) 229; Violet v. Fairchild, 6 La. Ann.

193; *Whipple v. Hill*, 14 La. Ann. 437; *Woods v. Pickett*, 30 La. Ann. 1095. Nor is the statute applicable when the vessel is not employed in the carrying trade, but is being held for resale: *Pickerell v. Fisk*, 11 La. Ann. 277. Even where liable as commercial partners under the statute, unless associated together under a title or as a firm, service of a citation upon one part owner will not affect the others: *Hefferman v. Brenham*, 1 La. Ann. 146.

4. **What Voyages Covered by.**—Whether, in any particular case, the partnership between the part owners in the employment of the vessel is a continuing one, covering all the voyages of the vessel, or is restricted to a particular venture, is, of course, a question to be determined by the facts of that case. “Generally,” it is said in *McLauthlin v. Smith*, 166 Mass. 131, 44 N. E. 125, “the relation of quasi partnership between ship owners is only for the particular adventure,” and the tendency of the majority of the cases seems to be to restrict the partnership relation to each separate voyage in the absence of evidence that the parties intended one subsisting, connected and continued partnership transaction which should include a number of voyages: *McLauthlin v. Smith*, 166 Mass. 131, 44 N. E. 125; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Mumford v. Nicoll*, 20 Johns. 611. In *The Pongola*, 73 L. T. 512, 8 Asp. M. C. 131, on the other hand, it is pointed out that this principle would be entirely inapplicable to the case of vessels employed on home or coasting voyages, “because there it would be ridiculous to talk of each sailing as being a separate venture. Take the case of a steamer plying between two ports or the extreme case of a channel steamer crossing the channel three or four times a day; it would be ridiculous to say that each voyage is a separate adventure, and it is admitted that in such cases there is a continued relation between the co-owners and the managing owners.” Each case undoubtedly stands on its own facts, and these facts may show the transaction to be a continued partnership covering many voyages: *Williams v. Lawrence*, 47 N. Y. 462, affirming 53 Barb. 320; *The Pongola*, 73 L. T. 512, 8 Asp. M. C. 89. See, also, dissenting opinion of Woodworth, J., in *Mumford v. Nicoll*, 20 Johns. 611, 624.

d. **Whether Fiduciary.**—Persons occupying toward each other the position of co-owners merely do not as such stand in a relation of a very high fiduciary character. In *Matthews v. Bliss*, 22 Pick. 48, an action was brought by one part owner against his co-owners for having conspired, after agreeing upon a sale of the vessel at a large price to induce the plaintiff’s agent, by a concealment of the fact that the vessel could be sold for such price, and by false and fraudulent representations to sell the plaintiff’s quarter part of the vessel at a price much below that which they had so agreed to sell for. Shaw, C. J., delivering the opinion of the court, said: “The court are of opinion that the tenants in common of a vessel who are not

engaged jointly in the employment of purchasing and building ships for sale do not stand in such a relation of mutual trust and confidence toward each other in respect of the sale of such vessel that each is bound in his dealings with the other to communicate all the information of facts within his knowledge which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property, in which relation perhaps they may be deemed to place confidence mutually in each other. But, as in common cases of tenants in common of a vessel, they are independent of each other in all matters of purchase and sale, and may deal with each other in the same manner as owners of separate property. Each may act upon the knowledge which he has, without communicating it. But, *aliud est tacere aliud celare*. With this advantageous knowledge, if there be studied efforts to prevent the other from coming to the knowledge of the truth, or if there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted with turpitude, and alike contrary to the rules of morality and of law. The decision, therefore, was correct in stating that the plaintiff must show that he had been induced to part with his one-fourth of the brig at a price less than its real value, by means of the alleged false representations and pretenses."

Where one of three co-owners was appointed ship's husband, and was allowed a commission on "gross freight," the contract being terminable by the other owners (they to purchase his shares) in case of gross fraud or negligence on the part of the ship's husband, the latter effected a charter-party of the vessel under which the charterer was to pay all expenses and a certain sum per week for the ship, in addition to a weekly sum payable to the ship's husband. The receipt of this last amount he concealed from his co-owners. This, it was held, constituted a fraud on such co-owners, entitling them to terminate the agreement: *Brenan v. Preston*, 2 Week. Rep. 138. In *Ritchie v. Couper*, 28 Beav. 344, the same principle was laid down with reference to supplies furnished a ship by a ship's husband, who was also a merchant. In the absence of acquiescence or assent on the part of his co-owners to his charging more, it was held that he was only entitled to charge the cost price. In that case, however, such assent was shown.

It is to be noted that in both of the cases cited in the foregoing paragraph the offending owner was not merely a co-owner, but likewise a ship's husband. There existed between him and his co-owners, therefore, a relation of principal and agent, as well as of part ownership. That the former relation is of a fiduciary character there can be no doubt, and the acts prohibited the ship's husband in the cases mentioned might have been quite permissible if (as in *Matthews v. Bliss*, 22 Pick. 48) the relation was one of co-ownership merely, unconnected with an agency.

II. Rights and Liabilities Inter Se.

a. Employment of Vessel.

1. Public Interest Involved.—Part owners of vessels are, as we have seen, tenants in common, and their rights and liabilities are in general those which appertain to tenants in common of other chattels. In certain particulars, however, they are widely different, and in no connection more so than in the principles which govern the rights of the cotenants as between themselves to the possession, management, and control of the common subject of ownership. With reference to chattels generally, all of the tenants in common are equally entitled to their possession and enjoyment. If unable to agree among themselves as to the management of the common property, the loss is their own, and each tenant being equally entitled to the possession, “no cotenant has such superior rights that the law will interfere in his behalf to wrest the possession from another who is equally entitled thereto”: Freeman on Cotenancy and Partition, sec. 288.

“In reference to ships, however, this rule as to personal chattels does not prevail. Being built to plough the sea, and not to lie by the walls, there are certain positive rules prescribed as to employment. Such rules are in the interest of the public and to prevent idleness as the result of obstinacy. The employment of the ship is not, like the employment of a horse or other chattel, considered a matter of private concern alone, but the state enables even minority part owners to keep it employed against the wish of other part owners not so desiring, its employment being considered a matter of public concern and interest. . . . The difference in the principles applicable to the matter of the employment of this chattel does not result from a desire of the sovereign to give the part owner of a ship any greater rights as to its employment than exist as to any other chattel, or to give him rights of action resulting, when exercised to his private benefit, in the form of damages for nonuser. The right is given as a means of public benefit and advantage, and that is given as the ground of difference by all the authorities upon the subject”: Hyer v. Cars, 17 Fla. 332. To the same effect, see Gould v. Stanton, 16 Conn. 11; Andrews v. Betts, 8 Hun, 322; Davis v. The Seneca, Gilp. 10, Fed. Cas. No. 3650.

2. Where Majority in Interest Desire to Employ.

A. Under Maritime Codes Generally.—The constitution of the United States, in conferring “admiralty and maritime jurisdiction” upon the federal courts, neither in terms nor in effect limited that jurisdiction to such as was enjoyed by the English court of admiralty. The jurisdiction of the federal courts under this grant depends upon the admiralty or maritime nature of the case, and not upon the very restricted power exercised at various times in England by the court known as the high court of admiralty: Benedict’s Admiralty, 3d ed.,

sec. 36; and both the extent of this jurisdiction and the law regulating its exercise are to be sought for in the general maritime law of nations: *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; *Tunno v. The Betsina*, Fed. Cas. No. 14,236. In this country, therefore, a consideration of the laws as to the employment of vessels in countries other than England is of more than speculative value.

Where the majority in interest of the owners of a vessel desire to employ such vessel in a particular way, their right to do so, even as against the wish of a dissentient minority, seems to have been everywhere recognized. The control of the vessel's employment was in such case vested in the majority by the Roman maritime code, by the laws of France (contained in the ordinances of Louis XIV), and by the ordinances of the House towns, and of *Wisbuy*: *Williams v. Kelly*, 2 Conn. 218, note; *Jouanneau v. Shannon*, 4 La. Ann. 330; *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *MacLachlan on Law of Merchant Shipping*, 4th ed., 102.

B. In England.—In England the right of the majority in interest to determine and control the employment of the vessel is equally undoubted, the marked difference between the English law and that of the continental codes lying in the security it affords to the dissentient minority. In the maritime ordinances of the other European countries the control of the majority was absolute in determining the employment of the common property. In England the right of the majority in this respect is subject to the power of the court of admiralty on the application of the dissenting part owners to require the majority seeking to employ the vessel to give a bond for its safe return, and for the payment of the value of the shares of the dissentient co-owners in case of loss. The protection thus afforded the minority will be hereafter discussed (see post, II, a, 7), but apart from this qualification, the principle is undoubted in English law that the majority desiring to employ a vessel controls as against a minority objecting, either to the nature of the employment proposed by the majority, or opposing its employment generally: *The Vindobala*, 58 L. J. Adm. 51, 14 P. D. 50, 60 L. T. 657, 37 Week. Rep. 409, 6 Asp. M. C. 376; *The Margaret*, 2 Hogg Adm. 275; *Cord v. Hope*, 2 Burn, etc., 661.

C. In the United States.—In this respect the law of this country is identical with that of England. Here, as there, the majority in interest of the part owners control and may employ the ship as they see fit, subject to the right of a dissenting minority part owner to compel the giving of a stipulation by the majority so desiring to employ the vessel by which they bind themselves to effect its safe return, or in case of loss to reimburse the minority for the loss of their shares: *Williams v. Kelly*, 2 Conn. 218, note; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Hyer v. Caro*, 17 Fla. 332;

Swift v. Tatner, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842; **Jouanneau v. Shannon**, 4 La. Ann. 330; **Swain v. Knapp**, 34 Minn. 232, 25 N. W. 397; **Williams v. Hays**, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449; **Andrews v. Betts**, 8 Hun. 322; **Gray v. Allen**, 14 Ohio, 58, 45 Am. Dec. 523; **The Orleans v. Phoebe**, 11 Pet. 175; **The Annie H. Smith**, 10 Ben. 110, Fed. Cas. 420; **Bragdon v. The Kitty Simpson**, Fed. Cas. No. 1798; **The Ocean Belle**, 6 Ben. 253, Fed. Cas. No. 10,402; **The Seneca**, 3 Wall. Jr. 395, Fed. Cas. No. 12,670.

In **Southworth v. Smith**, 27 Conn. 355, 71 Am. Dec. 72, after stating the law as laid down in the treatises on the subject to be that "if the minority happen to have possession of the ship, and refuse to employ it, the majority may, by warrant for that purpose, obtain possession of the ship and send it to sea, upon giving the customary security to the minority for its safe return," the court says: "From the limitation as thus expressed, of the right of the majority to a case where the minority in possession of a ship refuse to employ it, it seems to be implied that unless there is such a refusal, the majority could not by such a proceeding dispossess them of the ship, and it does not appear to be explicitly settled that the majority could do so." This conclusion was, however, conceded by the court to be a dictum unnecessary for the decision of the case and is at least doubtful.

3. Where Majority in Interest Unwilling to Employ.

A. In France.—Where the conflict occurs between a majority unwilling to employ and a minority desirous of employing the vessel, a different question is presented. According to the law of France, the majority controlled, and if they so desired it, the vessel remained unemployed: 1 Valin Com. 582; **Tunno v. The Betsina**, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; Story on Partnership, sec. 434. As to the laws of the other maritime nations in such case, see **Tunno v. The Betsina**, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236.

B. In the United States considerations of public policy have led to the adoption of a different rule. The consequences to commerce are much the same whether the idleness of a vessel is caused by the majority or the minority of its owners, and if the majority refuse to employ the vessel, a court of admiralty will deliver its possession to the other part owners willing to employ it. The rights of the majority in such case find ample protection in the power of the court, on application being duly made, to compel the part owners who are sailing the vessel to give a stipulation for its safe return such as is ordinarily given the dissenting minority: **Gould v. Stanton**, 16 Conn. 11; **Southworth v. Smith**, 27 Conn. 355, 71 Am. Dec. 72; **Hyer v. Caro**, 17 Fla. 332; **Andrews v. Betts**, 8 Hun, 322; **The Orleans v. Phoebe**, 11 Pet. 175; **Lewis v. Kinney**, 5 Dill. 159, Fed. Cas. No. 8325; **Tunno v. The Betsina**, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236.

C. In England the rule would seem to be the same, and to the effect that those wishing to employ the vessel, although they constitute but a minority of the owners, should control as against even a majority refusing to employ: See *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236 (citing *Molloy*, 220; *Anonymous*, *Skin*. 230). In *The Elizabeth and Jane*, 1 Wm. Rob. 278, however, the power of the court of admiralty to decree possession in such case to any interest less than a majority is denied.

4. Where Opposing Interests are Equal.

A. One Desiring and One Adverse to Employment of Vessel.—Still another case in which the right of part owners as between themselves to determine the employment of the ship arises where the disputant parties own equal interests. Where the question at issue in such case is whether the ship shall or shall not be employed, the moiety desiring its employment is entitled to possession and control as against the moiety seeking to keep it in idleness. Such is not only the rule of the common law, but generally of the maritime nations: *Davis v. The Seneca*, Gilp. 10, Fed. Cas. No. 3650; *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *Freeman on Cotenancy and Partition*, sec. 389.

B. Both Desiring to Employ Vessel.—Where the conflict between an equality of interests is not as to the employment or nonemployment of the vessel, but where each of the parties is equally willing to employ it, differing only as to the nature of such employment, the law does not presume to decide upon the merits of the controversy and award possession to one or the other accordingly: *Freeman on Cotenancy and Partition*, sec. 389. Neither is in such case entitled to preference, and the remedy, if any exist, is to be found in a sale of the vessel: See post, II, a, 8, C.

5. Control in Appointment of Master.

A. General Rule—Majority Controls.—Not infrequently the bone of contention between part owners is the appointment of a master, rather than the advisability of a particular voyage. In such case the rules above laid down with reference to the general management of the ship control. The part owner or owners entitled to direct the employment of the vessel are as an incident of that general power entitled to appoint and discharge its master and its crew: *Smith-Green Co. v. Bird* (principal case), 96 Me. 425, ante, p. 352, 52 Atl. 910; *Ward v. Ruckman*, 36 N. Y. 26; *In re The Eliza B. Emory*, 3 Fed. 241; *Clayton v. Eliza B. Emory*, 4 Fed. 342, *The Lucate Merry*, 10 Ben. 140, Fed. Cas. No. 8423; *Diedman v. The Joseph Hume*, Fed. Cas. No. 3991; *Revens v. Lewis*, Fed. Cas. No. 11,711, 2 Buire. 202; *The New Draper*, 4 C. Rob. 287. See, also, *The Eclipse* (Dak.), 30 N. W. 159. As to whether a relation of agency exists between part owners and a co-owner who holding a majority interest, appoints himself master, see *Ryer v. Caro*, 17 Fla. 332.

B. Where Master is Part Owner.—The right of the majority in interest to remove a master who is himself a part owner arises in this connection. In *The New Draper*, 4 C. Rob. 287, in giving judgment in a suit brought by the owners of nine-sixteenths of a vessel to dispossess the master, the owner of the seven-sixteenths, Sir W. Scott said: "The dispossession of a master is in its nature not an uncommon proceeding; all that the court requires in cases where the master is not a part owner is that the majority of the proprietors should declare their disinclination to continue him in possession. In the case of a master, something more is required before the court will proceed to dispossess a person who is also a proprietor of the vessel, and whose possession, therefore, the common law is, upon general principles, inclined to maintain." The court, however, decreed possession to the majority in that case, saying that the case was a common case of the majority of owners proceeding against one in which the common rule of the court must be pursued.

In this country the uniform weight of authority is to the effect that the fact that the master is a part owner cannot affect the right of the majority to remove him at will, and the existence of any such thing in law as a "sailing or master's interest" is quite uniformly denied. In *Ward v. Ruckman*, 36 N. Y. 26, Davies, C. J., in the course of an extended discussion of this question and review of the authorities bearing upon it, says: "I have looked in vain at all the authorities referred to and text-books accessible to me, and in none do I find any such interest mentioned or referred to." The union of the position of master and the relation of part owner in the same person gives such person no peculiar rights in the control of the vessel, and unless he controls one-half or more of the shares in the vessel, he may be removed from his position of master at the will of the majority, and though no cause for removal is assigned: *Ward v. Ruckman*, 36 N. Y. 26, 93 Am. Dec. 479; *In re The Eliza B. Emory*, 3 Fed. 241; *Clayton v. The Eliza B. Emory*, 4 Fed. 342; *Diedman v. The Joseph Hume*, Fed. Cas. No. 3901. Compare *Smith-Green Co. v. Bird* (principal case), 96 Me. 425, ante, p. 352, 42 Atl. 910.

By United States Revised Statutes, section 4250, "any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner. This section shall not apply where there is a valid written agreement subsisting by virtue of which such master would be entitled to possession, nor in any case where a master has possession as part owner, obtained before the ninth day of April, 1872": See, in this connection, *The Eclipse* (Dak.), 30 N. W. 159; *Smith-Green Co. v. Bird*, 96 Me. 425, ante, p. 352, 52 Atl. 910; *Clay-*

ton v. The Eliza B. Emory, 4 Fed. 342; The Lizzie Merry, 10 Ben. 140, Fed. Cas. No. 8423.

C. Validity of Contracts by Majority Surrendering Control.—This power of the majority to appoint and remove the master is held to be burdened with a trust to exercise it for the benefit of the other part owners, and its exercise in a free and impartial manner a service of such public concern, that any contract by which such control is surrendered indefinitely is regarded as against public policy and void. A contract that the right of appointing the master shall attach to a particular share or to continue a certain person in that position is of this nature, and unenforceable. The rule itself and the considerations of public policy which prompt it are nowhere better expressed than in the leading case of *Card v. Hope*, 2 Barn. & C. 661, in the opinion of Abbot, C. J. (Lord Tenterden): "It is a part of our national policy to give every encouragement to the equipment and employment of ships. Upon this consideration the law enables a majority of the part owners (under guards, indeed, to the interest of the minority, peculiar to itself) to employ their ships even against the will of the minority, that the ships may not remain unemployed. A power of employment vested in the majority seems to import a power of appointing officers, and in practice the majority certainly exercise that power. But such a power carries with it a duty—the duty of exercising a free and impartial judgment in the choice of every person who is intrusted with the management of the outfit and with the navigation of the ship, ut dentor digniori, and any contract which is calculated to have the effect of fettering the judgment and of binding the party to concur in his nomination of particular persons at the peril of an action is a violation of duty. The violation of duty becomes greater and more odious if the contract be founded on motives of peculiar gain and advantage to the contractors; all the part owners ought to share ratably in every profit of the ship, and if such contracts could be allowed by law, they must operate as a discouragement to persons to become owners of ships. The duty, however, is owing not only to the charterers and part owners, but also to another most important object, namely, the protection and safety of the lives embarked on the sea." And to the same effect see *Smith-Green Co. v. Bird* (principal case), 96 Me. 425, ante, p. 352, 52 Atl. 910; *Rogers v. Sheerer*, 77 Me. 323; *Ward v. Ruckman*, 36 N. Y. 26, 92 Am. Dec. 479; *In re The Eliza B. Emory*, 3 Fed. 241. See, however, *Moore v. Curry*, 106 Mass. 409.

With reference to the remarks of Abbot, C. J., in the above quotation, to the effect that all of the part owners should share equally in money received by one for his vote for a certain person as master, compare *Moffat v. Farquharson*, 2 Bro. C. C. 338, where, in allowing a demurrer to a suit by one part owner against a co-owner for an accounting of profits of the ship, particularly for money paid to the defendants for their vote in the appointment of a captain,

it is said: "It is not illegal for an owner of a ship to sell his vote in the election of the captain. The money so received can never be a profit of the ship. I am of opinion the plaintiff has no equity."

6. **What Constitutes a Majority in Interest.**—In determining the right of possession as between co-owners, a court of admiralty looks to the legal title, and not to the beneficial or equitable interests in the asserted owners. Those asserting themselves to constitute a majority must establish their position as such by holding the legal title: *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. 420; *The Valiant*, 1 Wm. Rob. 64. And a mortgagee of a share who has not taken possession cannot maintain an action of restraint: *The Innisfallen*, 35 L. J., Adm. 110, L. R. 1 Ad. & E. 72, 16 L. T. 71, 12 Jur., N. S., 653. See, also, *The Jane*, 23 L. T. 791. While, however, a court will not decree possession to a majority who cannot establish its position as such by proof of a legal title in them to the required number of shares, it will not, on the other hand, give possession to a majority, even though it holds the legal title, where the equitable title to certain of the shares necessary to make it a majority is in the minority in possession of the ship. "There is a distinction between enforcing an equitable right at the instance of the party claiming such right, and refusing to enforce the claim of a legal owner to the disregard of an equitable right": *The Victoria*, Swab. 408, 7 Week. Rep. 330, 5 Jur., N. S., 204.

Where the petitioners for a change of the possession of a vessel do not constitute a majority of all the shares, it will be presumed that those who do not apply are satisfied that the possession of the vessel should not be altered: *The Friendship*, 2 Curt. 426, Fed. Cas. No. 5123; *The Valiant*, 1 Wm. Rob. 64. Where, however, the cause has progressed to a hearing, without any proxies being called for, nor any suggestion made that the person instituting the suit was unauthorized to do so in behalf of all the shares (a majority) for the benefit of which he brings the suit, it will be taken for granted that the owners of such shares are consentient to the action: *The New Draper*, 4 C. Rob. 287.

7. Protection of Dissenting Interests by Requiring a Bond for Safe Return of Vessel.

A. **General Rule.**—In matters connected with the employment of a vessel, the peculiarity of the law in England and America lies, as we have seen, not in the very extended powers of control given to the majority in interest of the part owners, but rather in the protection afforded by it to the interests of a dissenting minority. The English court of admiralty was open all the year round to applications by part owners to restrain the sailing of ships until security had been given by the majority for their safe return: *Haly v. Goodson*, 2 Mer. 77, 16 R. R. 145; and no branch of admiralty jurisdiction is better settled than the power of the court to order the giving of such security on application by a minority, and to restrain the

employment of the vessel by the other part owners until they have executed a bond protecting the shares of the dissenting co-owners: *Williams v. Kelly*, 2 Conn. 218, note; *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72; *Hyer v. Caro*, 17 Fla. 332; *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842; *Jouanneau v. Shannon*, 4 La. Ann. 330; *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420; *Bragdon v. The Kitty Simpson*, Fed. Cas. No. 1798; *Coverdale v. The North America*, *Crabbe*, 429, Fed. Cas. No. 3289; *The Marengo*, 1 Sprague, 506, Fed. Cas. No. 9066; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *Willings v. Blight*, Fed. Cas. No. 17,765; *Anonymous*, 2 Chit. 359; *Blackett v. Austey*, 1 Ld. Raym. 235; *Dimmock v. Chandler*, *Strange*, 890, Fitz-G. 197; *Haly v. Goodson*, 2 Mer. 77, 16 R. R. 145; *Lambert v. Aeretree*, 1 Ld. Raym. 223; *Ousten v. Hebden*, 1 Wils. 101; *In re Blanshard*, 2 Barn. & C. 244, 2 Dowl. & R. 177, 26 R. R. 329; *The Apollo*, 1 Hagg. Adm. 306; *The England*, 56 L. J. Adm. 115, 12 P. D. 32, 56 L. T. 896, 35 Week. Rep. 367, 6 Asp. M. C. 140; *The Talca*, 5 P. D. 169, 42 L. T. 61, 29 Week. Rep. 123, 4 Asp. M. C. 226.

B. Dissenting Majority May Apply for.—Nor is the right to demand security and to restrain the ship from sailing until it is given confined to applications by the minority. If for any reason the minority of the part owners is about to sail the vessel on a voyage against the will of the majority (as, for instance, where the majority while dissenting from the particular voyage refuse to employ the vessel at all themselves), the latter may require the minority to give security for the vessel's safe return and for indemnification in case of its loss: *Gould v. Stanton*, 16 Conn. 11; *Andrews v. Betts*, 8 Hun, 322; *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8325; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236.

C. What Waiver of or Laches Barring Right to Require.—A part owner dissenting from a voyage, and therefore entitled to require security for the value of his share, may, of course, bind himself not to exercise his legal rights in this respect: *The England*, 56 L. J. Adm. 115, 12 P. D. 32, 56 L. T. 896, 35 Week. Rep. 367, 6 Asp. M. C. 140. But such an agreement is not to be implied from the concurrence of the part owner in the appointment of a manager or ship's husband who has negotiated the charter from which the owner seeking security dissents: *The England*, 56 L. J. Adm. 115, 12 P. D. 32, 56 L. T. 896, 35 Week. Rep. 367, 6 Asp. M. C. 140; *The Talca*, 5 P. D. 169, 42 L. T. 61, 29 Week. Rep. 123, 4 Asp. M. C. 226 (as to the authority of the case last cited, see the remark of Lord Esher, M. R., in *The Vindobala*, 58 L. J. Adm. 51, 14 P. D. 50, 60 L. T. 657, 37 Week. Rep. 409, 6 Asp. M. C. 376).

The dissentient part owner seeking security must, moreover, act with reasonable diligence, and equity will not restrain the sailing of a ship until security is given, where the party applying has de-

layed his application until the last moment, and the other co-owners may have incurred the risk of demurrage or other like consequences should the injunction be granted: *Christie v. Craig*, 2 Mer. 137. So it was held in *Hallaran v. Donal*, 9 Ir. Eq. 217, that not only had the applicant mistaken his remedy in seeking an injunction in a court of equity until security should be given, such matters being within the jurisdiction of admiralty, but that he had precluded himself from obtaining relief by delaying his application until the ship was about to sail with a large number of emigrants aboard. Where, on the other hand, it appears that the applicant had early given his co-owners notice of his dissent, and his delay in making application to the court had not misled them into incurring risks or expenses in reliance on his assent, his mere delay in so applying cannot preclude him from obtaining the desired relief: *The Marengo*, 1 Sprague, 506, Fed. Cas. No. 9066. In *Davis v. Johnstone*, 4 Sim. 539, the application to restrain the vessel from sailing until the co-owners had given security for safe return was delayed until the latter had expended large amounts in repairing and fitting the ship out for the voyage. It was held that the part owner taking the security while not entitled to any of the profits of the voyage, was chargeable with his proportion of the costs of the repairs and outfit.

D. Condition of the Bond.—The bond which is required of the part owners employing the vessel against the wishes of certain of their co-owners is properly merely a bond for the safe return of the vessel. It should not be in the form of a bond to answer judgment in the action of restraint, nor should it guarantee the dissenting owner against liabilities which may be incurred by the vessel before her safe return nor for expenses advanced and against further loss: *The Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; *The Robert Dickson*, 54 L. J. Adm. 5, 10 P. D. 15, 52 L. T. 55, 33 Week. Rep. 400, 5 Asp. M. C. 341. In *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8325, Judge Dillon considers the protection thus afforded the minority interest entirely too limited, in permitting the majority, by giving a stipulation for the safe return of the vessel, to employ the vessel against the will of the minority, and without any compensation to the latter until the boat is worn out. The same view is taken by Story: *Story on Partnership*, sec. 431. Judge Dillon argues in favor of permitting a court of admiralty to require instead a stipulation for an ascertained reasonable compensation for the value of the use of the minority interest, the owner of the latter interest in such case to be his own insurer. The power of a court to exact such a stipulation is, however, more than doubtful: *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8325; *The Marengo*, 1 Low. 52, 1 Am. L. Rev. 88, Fed. Cas. No. 9065; *The Apollo*, 1 Hagg. Adm. 306. (See, also, following paragraph.)

E. Amount of Bond.—In England the amount of the bond required of the part owners operating the ship against the will of

certain of their co-owners is the value of the shares of such dissenting owners: *The Robert Dickson*, 54 L. J. Adm. 5, 10 P. D. 15, 52 L. T. 55, 33 Week. Rep. 400, 5 Asp. M. C. 341; *The England*, 56 L. J. Adm. 115, 12 P. D. 32, 46 L. T. 896, 35 Week. Rep. 367, 6 Asp. M. C. 140. In this country the practice, in certain courts at least, seems to be to require a bond of double the estimated value of such shares: *Fox v. Paine*, Crabbe, 271, Fed. Cas. No. 5014; *The Marengo*, 1 Sprague, 506, Fed. Cas. No. 9066. Ordinarily, as noted in the preceding paragraph, the stipulation does not contain any provision for compensating the dissenting owner for the loss of the use of his share. Where, however, in a suit for the sale of the vessel, brought by one half interest against the other moiety, where not only the title of the libellant, but also the fact of his dissent is denied by the claimant, who is in possession, the court may award possession to the claimant pending the hearing, upon his giving security for the half value of the vessel and for all compensation which the court may award the libellants for the use of their half interest, while the vessel is exclusively in the possession of the claimants: *Burr v. The St. Thomas*, Fed. Cas. No. 2195.

F. What a Return Satisfying Condition of Bond.—The period to be covered by the stipulation and what shall amount to a satisfaction of its condition and discharge the obligors of the bond, are, of course, dependent upon its terms. "The stipulation," it is said in *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236, "is in its nature provisional. It is not treated nor allowed as a continuing permanent arrangement, by which the rights of an owner are protected and preserved; but simply as a present measure of relief, afforded in a particular case for a particular voyage." Nevertheless it may, and sometimes does, cover more than a particular voyage, as in *The Vivienne*, 56 L. J. Adm. 107, 12 P. D. 185, 57 L. T. 316, 36 Week. Rep. 110, 6 Asp. M. C. 178, where the condition upon which the bond became payable was: "If the aforesaid steamship 'Vivienne' shall not safely return to a port within the jurisdiction of the honorable court from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claim for security for the value of their shares in the said steamship."

Where the stipulation is for the safe return of the vessel to a certain port, a return to another port within the jurisdiction of the court will not satisfy the bond. It still remains in force; no application for another stipulation to cover a voyage from the latter port is necessary or proper: *The Regalia*, 51 L. T. 904, 5 Asp. M. C. 338; and if the vessel be lost on the second voyage, the bond first given will apply to the loss: *The Susan E. Voorhis*, 10 Ben. 380, Fed. Cas. No. 13,633. In *The Margaret*, 2 Hagg. Adm. 275, the court refused, however, to declare forfeited a bond given for the safe return of a vessel to the port of Hull, where the vessel had been

carried in distress into Plymouth, another port of the kingdom, and within the jurisdiction of the court, and had there been arrested in suits of salvage and of wages.

G. Effect of, on Dissenting Interests, Right to Profits and Liability for Losses.—Where a part owner dissenting from a voyage which his co-owners are about to undertake applies for and secures a stipulation by them for the safe return of the vessel, the voyage so undertaken is made entirely at the risk and for the benefit of his co-owners. He is not chargeable with liabilities incurred, nor is he entitled to any profits earned in that adventure: *Hyer v. Caro*, 17 Fla. 332; *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *Scull v. Raymond*, 18 Fed. 547; *The Marengo*, 1 Low. 52, 1 Am. L. Rev. 88, Fed. Cas. No. 9065; *Streetly v. Winson*, 1 Vern. 297, *Skin*. 230. See, also, *Coyne v. Caples*, 7 Saw. 360, 8 Fed. 638. His co-owners are not liable to him for the use of his share of the vessel: *The Marengo*, 1 Low. 52, Fed. Cas. No. 9065; *Willings v. Blight*, Fed. Cas. No. 17,765; while he is chargeable with his share of the outfit and repairs of the ship, the expense for which was incurred previous to the time of his application to the court for the arrest of the vessel: *Davis v. Johnstone*, 4 Sim. 539. Whether such an application is the sole mode by which a dissenting part owner may protect himself from responsibility for liabilities incurred by the vessel while on the voyage objected to, see post, II, c, 2, B, and III, a, 6, d.

8. Jurisdiction Over Questions Concerning.

A. General Rule.—Contests among part owners of vessels as to the possession or employment of their common property is primarily a subject of admiralty jurisdiction, and equity will not interfere in matters of this nature where admiralty has power to give relief: *Costelli v. Cook*, 7 Hare, 89, 18 L. J. Ch. 148, 13 Jur. 675. Where, however, this is not so, as where, in an action for possession of the vessel or to restrain sailing until security is given, the amount of the respective shares is unascertained, equity will take jurisdiction: *Haly v. Goodson*, 2 Mer. 77, 16 R. R. 145; *Hollaran v. Donal*, 9 Ir. Eq. 217; *Costelli v. Cook*, 7 Hare, 89, 18 L. J. Ch. 148, 13 Jur. 675. Jurisdiction has, however, been conferred upon the English court of admiralty even where the amount of the shares is unascertained by 24 Victoria, chapter 10, section 8, giving that court jurisdiction over "all questions arising between the co-owners or any of them, touching the ownership, possession, employment and earnings of any ship," etc., and to settle accounts between co-owners. So, it has been held, equity has undoubted jurisdiction to enforce the rights of certain part owners against their co-owners with reference to the management of the vessel and the possession of the certificate of registry where those rights are regulated by an agreement between all the owners: *Darley v. Barnes*, 9 Hare, 369, 21 L. J. Ch.

801. A court of admiralty does all it can where in a suit for possession among part owners it restores the possession of the vessel to the majority. If thereafter the vessel is injuriously detained, the remedy must be sought elsewhere: *The John of London*, 1 Hagg. Adm. 342.

B. To Enforce Payment of Bond for Safe Return.—It was at one time doubtful whether a court of admiralty had the power to enforce the payment of a stipulation for the safe return of a vessel, where the condition of the bond had been breached by the loss of the ship, and the jurisdiction in this respect was denied: *Justice v. Brown*, Hardr. 473; *King v. Perry*, 3 Salk. 23. The contrary is, however, now the settled rule and the jurisdiction of admiralty to enforce the payment of a stipulation of this nature is undoubted: *The Susan A. Voorhis*, 10 Ben. 380, Fed. Cas. No. 13,633; *The Apollo*, 1 Hagg. Adm. 306; *Lambert v. Aeretree*, 1 Ld. Raym. 223; *Blackett v. Austey*, 1 Ld. Raym. 235; *Grave v. Hedges*, 2 Ld. Raym. 1285, Holt, 470. As to the practice of admiralty where no actual loss has occurred, but the vessel has not returned within the period fixed in the bond, see *The Margaret*, 2 Hagg. Adm. 275; *The Anne*, 2 Hagg. Adm. 280, note.

C. To Order Sale of Vessel.

(1) **Under Maritime Codes, Generally.**—Where a vessel is held by two conflicting interests, each equal in amount, and both equally desirous of employing it, an obvious difficulty arises. The principle that as between co-owners those desiring to employ the vessel shall prevail over those opposed to its employment, whether their interests be equal or unequal, and the principle that where both desire to employ, the interests being unequal, the majority shall control, are both inapplicable. Actual partition of the common property is rendered impracticable by its nature, and the most obvious remedy is its sale and distribution of the proceeds. Under the law of France and, it seems, of most of the maritime nations of Europe, a sale might be decreed and the proceeds distributed among the owners according to their respective shares: *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *Story on Partnership*, sec. 437.

(2) **In England—At Common Law.**—In England the common-law power of the court of admiralty in this respect was lamentably weak. The reason for this weakness is perhaps to be found in the jealousy with which the jurisdiction of that court was regarded by the other courts, and the very narrow limits within which it was permitted to act: See *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420. Whatever the reason of the rule, it was well settled that the English court of admiralty had no inherent power to order a sale

of a vessel, however great may have been the necessity for such a proceeding: *State ex rel. Gale v. Judge*, 7 La. 445; *Davis v. The Seneca*, Gilp. 10, Fed. Cas. No. 3650; *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8325; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *Ousten v. Hebden*, 1 Wils. 101; *The Margaret*, 2 Hagg. Adm. 275.

(3) **In England—By Statute.**—This rule which Judge Story declared to be “a reproach, both to the equity and the justice” of the common law of England, was changed by statute in 1861, by what is known as the admiralty court jurisdiction act of 1861 (24 Vict., c. 10, sec. 8), to the effect that “the high court of admiralty shall have jurisdiction to decide all questions arising between the co-owners or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct said ship, or any share thereof, to be sold, and may make such order in the premises as to it shall seem fit.” Under this section the court may order a sale of the ship on the application of even a minority of the part owners: *The Nelly Schneider*, 3 P. D. 152, 39 L. T. 360, 27 Week. Rep. 308, 4 Asp. M. C. 54; *The Hereward*, 64 L. J. Adm. 87, 11 R. 798, 72 L. T. 903, 44 Week. Rep. 288, 8 Asp. M. C. 22. The power is one to be exercised with great caution, however, and the question is, to a great degree, left to the discretion of the court: *The Marion*, 54 L. J. Adm. 8, 10 P. D. 4, 51 L. T. 906, 33 Week. Rep. 432, 5 Asp. M. C. 339; *The Nelly Schneider*, 3 P. D. 152, 39 L. T. 360, 27 Week. Rep. 308, 4 Asp. M. C. 54; *The Hereward*, 64 L. J. Adm. 87, 11 R. 798, 72 L. T. 903, 44 Week. Rep. 288, 8 Asp. M. C. 22; and in the two cases last cited the order for a sale was made to become effective only in case the parties could not arrange the purchase of the shares of one of them at an appraised valuation. The court cannot order the part owners to bring the vessel home in order that it may be sold: *The Nelly Schneider*, 3 P. D. 152, 39 L. T. 360, 27 Week. Rep. 308, 4 Asp. M. C. 54. As to the right of a mortgagee of a share to maintain a suit for a sale of a vessel, see *The Jane*, 23 L. T. 791.

(4) **In the United States.**—In this country the courts have quite uniformly refused to hold themselves bound by the narrow view of the powers of the English court of admiralty taken by the common law, and, looking to the general maritime law rather than to that of England alone, have regarded a court of admiralty as possessed of the power, exercisable in proper cases, to order a sale of a vessel. The tendency of the American cases is to confine the power of sale to cases where the warring interests are equal, both desirous of employing the vessel, and where, therefore, the ordinary rules as to the control in the case of disagreeing part owners would give the control to neither and the effect of denying a sale would

be to keep the vessel in idleness: *Andrews v. Betts*, 8 Hun, 322; *The Orleans v. Phoebus*, 11 Pet. 175; *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420; *Coyne v. Coples*, 7 Saw. 360, 8 Fed. 638; *Burr v. The St. Thomas*, Fed. Cas. No. 2194a, Fed. Cas. No. 2195; *The Seneca*, 3 Wall. Jr. 395, Fed. Cas. No. 12,670, reversing *Davis v. The Seneca*, Gilp. 10, Fed. Cas. No. 3650; *Lewis v. Kinney*, 5 Dill. 159, Fed. Cas. No. 8325; *The Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236. See, also, *Hyer v. Caro*, 17 Fla. 332. In a few of the decisions other possible instances in which a sale might and should be granted are suggested: *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; the inclination in all, however, being, as has been said, to permit a sale only in cases "in which a disagreement between part owners cannot be determined by the operation of principles applicable to associated ownership, or such as are specially provided for an ownership in vessels." "Of what use," it is well said in *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236, "would be the principle which affirms the control resulting to a majority from the fact of its being so, if in any case in which it was to be applied, a court would be asked to decree a sale? It would soon be that the only mode for preventing a dissolution would be for the majority to render unquestioning accord to the wishes of the minority, no matter how small that minority, or unreasonable its exactions.

In determining the advisability of ordering a sale, the rule which in actions for possession among co-owners, restricts the court to a consideration of the legal title only, is inapplicable and it may consider as well the equitable title to shares in the vessel: *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420. The ordering a sale of the vessel rests finally in the discretion of the court. *The Annie H. Smith*, 10 Ben. 110, Fed. Cas. No. 420. As to the power of a court of equity to order a sale where the shares of the parties are unequal, see *Andrews v. Betts*, 8 Hun, 322.

b. Liability Between Co-owners.

1. **For Failure to Employ Vessel.**—With but few qualifications, the most important of which are those just considered, relating to the employment of vessels owned by disagreeing parties, and where the interests of commerce so control other considerations as to require the application of peculiar principles, the rights and liabilities of part owners of vessels are the same as those incident to a tenancy in common of other chattels. Even in the matter of regulating the employment, the peculiarities of the law controlling the relations of such part owners are confined to the advancement of the public interest only and as to purely private or individual benefits, the law is the same as in other cotenancies. One part owner is not liable to a co-owner for failure to employ the vessel, nor for profits which might have been earned had it been employed. *Hyer v.*

Caro, 17 Fla. 332. One part owner cannot bring an action against his co-owner for a mere deprivation of possession: *Banardiston v. Chapman*, 4 East, 121; *Knight v. Coates*, 1 Ir. L. R. 53. Nor, it seems, is he responsible to his co-owners for negligence in the employment or management of the common property: *Hyer v. Caro*, 17 Fla. 332; *Moody v. Buck*, 1 Sand. 304. (Compare, however, *Ralston v. Barclay*, 6 Mart. 649, 12 Am. Dec. 483; and below where the act of the co-owner amounts to a destruction of the vessel.) "Neither can have trespass or trover, nor indeed any action, against the other under circumstances which would not justify the maintenance of such action between other tenants in common": *Freeman on Cotenancy and Partition*, sec. 385. In *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139, it was held that one part owner might recover from his co-owner his share of the damages caused by a wrongful detention of the vessel by a sheriff, where the defendant by filing a release of damages after verdict had arrested judgment in an action by the co-owners against the sheriff for such damages.

2. **For Loss or Destruction of Vessel.**—Where a vessel is lost in the usual trade and without any negligence or willful misconduct on the part of the owner in charge, the loss falls on all the owners, and the owner in charge is not liable to the others for their respective shares: *Thoms v. Southard*, 2 Dana (Ky.), 475, 26 Am. Dec. 467; *Jouanneau v. Shannon*, 4 La. Ann. 330. (Compare *Pickerell v. Fisk*, 11 La. Ann. 277.) When, however, the loss of the vessel is traceable to the fault of a co-owner, each part owner has a right of action in tort against him to the value of such owner's share: *Knowlton v. Reed*, 38 Me. 246; *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449; *Banardiston v. Chapman*, 4 East, 121; *Knight v. Coates*, 1 Ir. L. R. 53. And on the ground that it amounted to a destruction of joint property "or profits," this principle was extended in *Kellum v. Knechdt*, 17 Hun, 583, to permit of a recovery by some of the part owners of a vessel against others, who by its wrongful seizure interrupted a voyage for which the vessel was at the time under charter.

In *Moody v. Buck*, 1 Sand. 304, it was held that the mere negligence of one part owner, although it resulted in the entire loss of the vessel, gave his co-owner no right of action, the court holding that recovery in such cases was confined to cases of "actual destruction of the property by the cotenant, or a constructive destruction by his willful act." The case is, however, overruled in *Williams v. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. 449, and the rule there laid down said to be "not consonant with reason or justice."

Whether an attempted sale of the vessel by one co-owner is a destruction within the meaning of the rule allowing recovery in such cases depends upon the circumstances. Referring to the meaning of "destruction" in this connection, it is said in *Knight v.*

Coates, 1 Ir. L. R. 53: "If we examine the meaning of that phrase, we shall find that it does not imply that the thing should be actually destroyed—by burning, for instance, or by some other means whereby an actual loss may be occasioned—but a destruction, within the meaning of that phrase, takes place, as I apprehend, whenever the plaintiff's right of recaption has been entirely put an end to by the act of the defendant." As a general rule, one tenant in common cannot dispose of his cotenant's share in the joint property, and any attempt by him to do so is a vain act: See post, III, d, 1. Accordingly, in such a case, where no other facts appear, the co-owner would still have his right of recaption, and no "destruction" within the meaning of the rule would seem to have occurred: *Mayhew v. Herrick*, 7 Com. B. 229; *Heath v. Hubbard*, 4 East, 110; *Graves v. Sawcer*, 1 Keb. 38, 1 Lev. 29; *T. Raym.* 15. See, however, *Coursin's Appeal*, 79 Pa. St. 220. Where, however, the sale does have the effect of preventing recaption by the plaintiff, as where the vessel was sold in market overt, or where subsequent to the sale it was actually lost, there may be recovery by the part owner against his former tenant in common for the value of his share: *Barnadiston v. Chapman*, 4 East, 110; *Mayhew v. Herrick*, 7 Com. B. 229; *Knight v. Coates*, 1 Ir. L. R. 53.

c. Right to Earnings of Vessel.

1. **General Rule.**—"The primary relation of part owners of ships to each other is that of tenants in common of chattels. By the common law one tenant in common having possession of a chattel may use it for his own exclusive benefit, and while doing so he alone is liable for all charges affecting it. This rule, as applied to ships, has been so far modified as to entitle each part owner to receive his share of the earnings of the vessel, unless he has dissented from the voyage": *Scull v. Raymond*, 18 Fed. 547. To the same effect see *Gould v. Stanton*, 16 Conn. 12. Part owners of a vessel cannot, therefore, by excluding their co-owners from the possession of the vessel, although the latter hold a minority of the shares, deprive them of their proportion of the vessel's earnings. The excluded part owners may, and, where they do not dissent from the voyage are presumed to, stand upon their legal rights, and claim the benefit of the voyages made: *Scull v. Raymond*, 18 Fed. 547; *Anonymous*, Skin. 230.

2. Where Part Owner Dissents from Voyage.

A. **Taking Bond for Safe Return.**—Since, however, a right to share in the earnings carries with it the obligation to contribute to the losses, a part owner may undoubtedly dissent from a proposed adventure, and by making his dissent effective may absolve himself from all connection with it. In such a case the adventure is at the risk of, and for the benefit of, the other co-owners. What,

then, is necessary to make the dissent effective? Where the dissenting part owner, by application to a court of admiralty, requires of his co-owners a stipulation for the safe return of the vessel, not only does he deprive himself of any participation in the earnings and repel any idea of liability to contribute to the losses of the voyage, but if the vessel itself be lost, he is entitled to reimbursement for his share: See *supra*, II, a, 7.

B. Effect of not Taking Bond for Safe Return.—According to expressions to be found in a number of cases, an application to admiralty is not only conclusive, but necessary, to establish the dissent of a part owner. Thus, in *Jouanneau v. Shannon*, 4 La. Ann. 330, it is said to have been held "that if the dissenting part owner does not apply for security, he is supposed to consent to the employment of the ship, is liable for his share of the expenses, and entitled to a share of the profits," citing *Gould v. Stanton*, 16 Conn. 11. Compare, also, *Gould v. Stanton*, 17 Conn. 377; *Williams v. Kelly*, 2 Conn. 218, note. By the better rule, however, such a procedure, while undoubtedly sufficient, and indeed conclusive, of the applicant's dissent from the voyage, is not the only mode by which such dissent may be effective. An open dissent or protest, known to the co-owners and showing that the part owner dissenting does not intend that the voyage shall be made on his account and at his risk, is sufficient: *Swain v. Knapp*, 34 Minn. 232, 25 N. W. 397; *Scull v. Raymond*, 18 Fed. 547; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *Horn v. Gilpin*, Amb. 255 (correcting wrong report of *Strelly v. Winson*, 1 Vern. 297); *Anonymous*, Skin. 230. See, also, *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842. So on exclusion of one part owner by his co-owners from all participation in the management of the vessel, and in the profits of a voyage, where such exclusion is acquiesced in by the party excluded, or where he dissents from the particular voyage, the adventure will not inure to his benefit, nor is he liable to be made to contribute to his losses: *Scull v. Raymond*, 18 Fed. 547. The fact that a minority owner dies while the vessel is being employed by the majority interests does not affect the distribution of profits and losses. If the deceased was entitled to share in the former or bound to contribute to the latter, his heirs take the same position: *Jouanneau v. Shannon*, 4 La. Ann. 330.

3. Right of Mortgagee to Share in Earnings.—The mortgagee of a share in a vessel takes no greater rights against the co-owners of the mortgagor, in the distribution of the vessel's earnings, than the mortgagor himself had. His right to share in the earnings is coincident with his obligation to contribute to the expenses of the voyage, and his liability in the latter respect is unaffected by the fact that he did not take possession until the return of the vessel from the voyage and, therefore, subsequent to the incurring of such expenses: *Alexander v. Simms*, 18 Beav. 80; on appeal, 5 De Gex,

M. & G. 57, 23 L. J. Ch. 721, 2 Week. Rep. 329. If the mortgagee of a share unites with the other co-owners in the removal of his mortgagor as ship's husband and the appointment of another person in that capacity, this is a sufficient taking of possession by the mortgagee to displace the title of his mortgagor to the freight, and such mortgagor is not entitled to receive his share of the freight, either as ship's husband, or as part owner: *Beynon v. Godden*, 48 L. J. Ex. 80, 3 Ex. D. 263, 39 L. T. 82, 26 Week. Rep. 672, 4 Asp. M. C. 10.

d. Disposal of Shares in Vessel.

1. Right to Dispose of Co-owner's Share.

A. General Rule.—As respects the right of one part owner to dispose of the interest of a co-owner in the vessel, part owners of vessels are on the same footing as other tenants in common of chattels. Part ownership in itself confers no such power of disposal of a co-owner's interest on the holder of a share in a vessel, and neither by sale nor mortgage can the holder of any number of shares, whether a majority or minority, affect the title of a co-part owner to his share in the vessel: *Whipple v. Hill*, 14 La. Ann. 437; *Byrne v. Hooper*, 2 Rob. (La.) 229; *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782; *Lamb v. Durant*, 12 Mass. 54, 7 Am. Dec. 31; *Whiton v. Spring*, 74 N. Y. 169; *Coursin's Appeal*, 79 Pa. St. 220; *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7669; *The Faust* (*Burn v. Herlofson*), 56 L. T. 722, 6 Asp. M. C. 126; *Mayhew v. Herrick*, 7 Com. B. 229. A part owner holding merely an equitable title, however, may be prevented from asserting it as against a bona fide purchaser of the legal title taking without notice of the equity, although the sale was made by his co-owners and the legal title was transferred at their request by the party holding it in trust for all the part owners: *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7669.

B. Where Partners in the Vessel.—Where a partnership exists between the part owners, and the ship is held as partnership property, the rules of partnership rather than of part ownership apply. Where this is the case, any of the partners may sell or mortgage the entire vessel: *Lamb v. Durant*, 12 Mass. 54, 7 Am. Dec. 31; *Patch v. Wheatland*, 8 Allen, 102.

2. Consent of Co-owners Unnecessary.—This distinction between a partnership and part ownership of vessels, with reference to the disposal of the shares held by each co-owner, is further illustrated by the right of any part owner to sell or otherwise dispose of his shares without the consent of any co-owner. "A consequence of this general relation of tenancy in common in a vessel must be, that each joint owner can transfer his interest therein, without giving notice to, or obtaining the consent of the others, and that this is an implied condition, in any incidental partnership, that may arise from the connection": *Jones v. Pitcher*, 3 Stew. & P. (Ala.)

135, 24 Am. Dec. 716. See to the same effect, *Jones v. Sims*, 6 Port. (Ala.) 138; *Croasdale v. Von Boyneburk*, 195 Pa. St. 377, 46 Atl. 6; *The Pongola*, 73 L. T. 512, 8 Asp. M. C. 89. In *Seabrook v. Rose*, 2 Hill Eq. (S. C.) 553, it was agreed among the joint owners "that no share shall be transferred or assigned, without notice being first given to a majority of the stockholders of the owner's intention to transfer." This, it was said by the trial court, was not "such an agreement as would amount to what is called a limited copartnership (even if such were allowed by our laws), restraining the exercise of any powers which joint owners have over their shares. It is a mere agreement to give notice of an intended assignment. If the part owner should make such a transfer without notice, he may be responsible to the other owners for breach of the contract, but the assignment would be good as to third persons. The case then stands on the general ground of joint ownership."

In *The Hereward*, 64 L. J. Adm. 87, 11 R. 798, 72 L. T. 903, 44 Week. Reg. 288, 8 Asp. M. C. 22, there is laid down what seems to be a qualification of the right of the holders of shares in a ship to dispose of them to whom and as they please, without securing the consent of the holders of the other shares. In that case the holders of a majority of the shares formed a limited liability company to which they transferred these shares. Bruce, J., in ordering a sale of the vessel on the petition of the minority on the ground that by constituting themselves a limited liability company had made profitable employment of the vessel for all impossible, unless the dissentient minority owners agreed to come into the company, remarks: "In my opinion, the managing owners of the ship, the majority of the owners of the ship, have no right thus to change the character of the ownership of the ship, except with the consent of all persons concerned."

e. Privity Between.

1. **Effect of Admissions by One Part Owner.**—The relation of part ownership does not create a privity between part owners such that any is bound by an unauthorized admission of a co-owner: *McLellan v. Cox*, 36 Me. 95, 58 Am. Dec. 736; *Choteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Hopkins v. Forsyth*, 14 Pa. St. 34, 53 Am. Dec. 513; *Jaggers v. Binnings*, 1 Stark. 64. Where a partnership can be proved between them, the admissions of one are competent evidence against the others as to transactions during the existence of the partnership relation: *Phillips v. Purington*, 15 Me. 425; but even then only as to matters connected with the partnership and not as to matters relating only to the part ownership: *Jaggers v. Binnings*, 1 Stark. 64.

2. **Generally.**—Wherever the title of the several part owners is involved, no one is, in the absence of express authority, competent to bind the others. Service of process upon one part owner will not

amount to a service on the others, although in the employment of the vessel they are commercial partners: *Hefferman v. Brenham*, 1 La. Ann. 146. Nor, on the same principle, where a judgment has been obtained against the joint owners of a vessel, although in its employment they may be partners, a waiver by one of the formalities required by law for the sale of the vessel will not be binding on the others: *Byrne v. Hooper*, 2 Rob. (La.) 229. Notice by a captain to one part owner of the necessity for an immediate sale of the vessel will not operate as notice to the other co-owners, and a sale made by the captain without such notice to each of the other part owners, where they can be reached by the use of reasonable diligence, will be void as to the owners who were not notified: *Gates v. Thompson*, 57 Me. 442, 99 Am. Dec. 782. Similarly, knowledge by one of the part owners of the nature of a cargo will not render his co-owners liable to a penalty of contraband in the absence of knowledge on their part: *The Jonge Tobias*, 1 C. Rob. 329. A majority of the owners has power, it has been held, to conclude the other owners by settling the accounts of a voyage: *Robinson v. Thompson*, 1 Vern. 465; and to institute suit on a joint account on indemnifying the unwilling part owners against costs: *Richmond v. The New Bedford Copper Co.*, 2 Low. 315, Fed. Cas. No. 11,800. It seems that even at law one owner of a ship cannot release a debt due all the owners, where the debtor has knowledge of this fact: *Richmond v. The New Bedford Copper Co.*, 2 Low. 315, Fed. Cas. No. 11,800.

The right of one part owner as such and as managing owner to bind his co-owners by purchases and contracts made on their behalf, while, strictly speaking, a right existing as between the part owners themselves, arises most frequently in connection with the liability of the part owners to third persons from whom the purchase was made, or with whom the contract was entered into, and will, therefore, be considered in that connection: See, post, III, a.

f. Contribution Between.—Contribution between part owners of vessels differs in no way from the right of contribution between other cotenants, and this in turn, as is pointed out in *Freeman on Cotenancy and Partition*, 322, is governed by the same principles as when contribution is sought between persons who are not cotenants. Where a debt or other liability has been incurred, which binds each of the part owners, the part owner paying it has the right to compel contribution from the others, and to require them to reimburse him in the proportions held by each. The cases dealing with the subject of contribution between co-owners of vessels are nearly all concerned with the question whether the debt or liability incurred was binding on all, rather than with the liability of each to contribute if such common liability is established. Once this common liability is shown to exist, the right of the part owner discharging it to recover the contributory shares of his co-owners is undoubted: See *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; *Howrin v. Clark*, 8 Rob. (La.) 27; *Benson v. Thompson*, 27 Me. 470, 46

Am. Dec. 617; *Hill v. Crocker*, 87 Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105; *Sheehan v. Dalrymple*, 19 Mich. 239; and generally the cases cited post, in connection with the settlement of accounts between part owners.

g. Lien by Part Owner for Debts and Advances.

1. On Co-owner's Share in Vessel.

A. In General—Conflict of Authority.—A conflict more seeming than real, which nevertheless has been made the subject of no little discussion in the authorities, has been raised in connection with the right of one part owner to a lien upon his co-owner's share for the latter's proportion of advances made by the former in excess of his share, with reference to the joint property or business. The conflict began with the case of *Doddington v. Hallet*, 1 Ves. Sr. 496, in which Lord Hardwicke held that the facts of the case showing the part owners to be partners in the vessel, each had a lien on the other's share for his proportion of the balance due the partner on the settlement of the partnership accounts. In certain subsequent cases, Lord Eldon employed language which overruled the opinion of Lord Hardwicke in *Doddington v. Hallet*, 1 Ves. Sr. 496. See *Ex parte Young*, 2 Ves. & B. 242, 2 Rose, 78, note, 13 R. R. 73; and by the English courts and some of the American cases *Doddington v. Hallet*, 1 Ves. Sr. 496, has been discredited and declared to have been "authoritatively exploded": *Nicoll v. Mumford*, 4 Johns. Ch. 522; *The Jennie B. Gilkey*, 20 Fed. 161; *Green v. Griggs*, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326; *Ex parte Leslie*, 3 L. J. Bk. 4. See, also, *Seabrook v. Rose*, 2 Hill Eq. (S. C.) 553.

B. General Rule—Weight of Authority.—A fairer view of the decision of Lord Harwicke, and the view already shown to have been taken in *Mumford v. Nicoll*, 20 Johns. 611 (see *supra*, 363. See, also, *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198), is that the case does not hold all part owners to be partners and entitled to a lien on their co-owner's share for a balance due on the partnership account, but rather that the facts of *Doddington v. Hallet*, 1 Ves. Sr. 496, were held by him to show a partnership to exist in that case between the part owners, and that the partnership lien therefore attached. Where the part owners are partners, there can be no question that the ordinary rules of partnership control, and each has a lien on the partnership stock not only for the amount of his share, but for money advanced by him beyond that amount for the use of the co-partnership: *Allen v. Hawley*, 6 Fla. 142, 63 Am. Dec. 198; *Mumford v. Nicoll*, 20 Johns. 611. If *Doddington v. Hallet*, 1 Ves. Sr. 496, is unsound at all, it is, therefore, unsound only so far as it gives part owners such a lien when no relation of partnership exists between them: *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933.

Where the relation between the part owners is one of part ownership merely, and the vessel is in no sense a partnership asset, the cases

are quite uniform to the effect that no lien exists in favor of one part owner on the ship, or on the share of a co-owner for a balance due on the part ownership account: *Merrill v. Bartlett*, 6 Pick. 46; *Thorndike v. De Wolf*, 6 Pick. 120; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Mumford v. Nicoll*, 20 Johns. 611; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Seabrook v. Rose*, 2 Hill Eq. (S. C.) 553; *The Jennie B. Gilkey*, 20 Fed. 161; *The Daniel Kaine*, 35 Fed. 785; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Patton v. The Randolph*, 1 Gilp. 457, Fed. Cas. No. 10,837. Compare, also, *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Gallatin v. The Pilot*, 2 Wall. Jr. 592, Fed. Cas. No. 5199; *The Larch*, 2 Curt. 427, Fed. Cas. No. 8085. This may, of course, be changed by statute. See *The H. E. Willard*, 52 Fed. 387, with reference to a statute of Maine giving part owners and others a lien on the vessel for advances for necessary repairs and supplies.

2. On Co-owner's Share in Earnings.

A. Where Partners in the Employment of the Vessel.—In this, as in other connections, a distinction already adverted to (*supra*, I, c, 3 B) must be borne in mind. The relation of part owners to the vessel is one thing. Their relation to the cargo or the earnings of the vessel may be quite another. They may be, and usually are, tenants in common of the ship, and, at the same time, partners as to its employment and earnings. In such a case a part owner might well have a lien for his advances upon co-owner's share of the cargo or earnings and none whatever upon such share in the vessel. The earnings of the vessel being a partnership fund, none of the partners is entitled to his share until all advances made by his copartners in excess of their respective shares have been paid: *Mumford v. Nicoll*, 20 Johns. 611; *Nicoll v. Mumford*, 4 Johns. Ch. 522; *Williams v. Lawrence*, 47 N. Y. 462, affirming 53 Barb. 320; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Holderness v. Shackels*, 8 Barn. & C. 612; *Green v. Briggs*, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326. In this regard there is no distinction between the freight earned by a ship and other earnings, such as the net proceeds from a cargo: *Green v. Briggs*, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326.

The principle which gives a partner a lien upon the partnership stock for the balance due him covers only advances made or money paid in connection with partnership business. Where, therefore, the parties occupy dual positions with reference to a vessel, being mere tenants in common of the ship itself, while partners as to its employment, it may become a nice question whether certain advances, as for repairs, were made by one, as part owner of the hull of the vessel, or as a partner in its employment. Such was the question in *Green v. Briggs*, 6 Hare, 395, 17 L. J. Ch. 323, 12 Jur. 326, where repairs were made under the conditions referred to. Vice-chancellor Wigram held that cases might arise where repairs so made might be regarded as being an improvement of the chattel held in common, and there-

fore creating no lien on the ship in favor of the part owner advancing the money for their payment. Where, however, the repairs, as it appeared in that case, were made with a view to a particular adventure, with reference to which the part owners were partners, and were repairs such that the adventure could not have been undertaken without them, the advances made for them should follow the rules of partnership. That the expenditure in repairs was not exhausted with the particular adventure was, it was held, a mere incidental consequence, not altering the case.

Whether the lien of a part owner of a vessel who is also a partner with his co-owners in the employment of the ship is limited merely to the amounts advanced by him on a particular voyage, or covers the advances made or money paid by him in previous adventures, is dependent entirely upon whether the partnership was a continuing one covering all the voyage made, or was restricted to each particular voyage. This question has already been considered: See *supra*, I, c, 4.

B. As Creditor in Possession.—In *Seabrook v. Rose*, 2 Hill Eq. (S. C.) 553, it was held that the part owners in possession of a vessel have a priority over attaching creditors for a debt connected with the joint ownership and owing from their copart owners. The decision is expressly put upon the ground that they are entitled to such preference as creditors in possession. In *The Larch*, 2 Curt. 427, Fed. Cas. No. 8085, on the other hand, it is said that the mere possession of one tenant in common cannot give him any rights adverse to his cotenant. The view of the case last cited seems preferable: See, also, generally in this connection, *Tunno v. Bethune*, 2 Desaus. Eq. (S. C.) 285.

C. As Materialman, etc.—Where one renders services or supplies material to a vessel, the mere fact that he is also a part owner does not, as against his co-owners, deprive him of any lien he would otherwise have against the vessel. "The mere fact that he is a part owner furnishes no reason why he should be denied the security enjoyed by others, unless for some special reason he has estopped himself from asserting his claim": *Pettit v. The Chas. Hemje*, 5 Hughes, 359, Fed. Cas. No. 11,047a; *Foster v. The Pilot No. 2*, 1 Newb. 215, Fed. Cas. No. 4980. Compare, however, *Dawling v. The Reliance*, 1 Woods, 284, Fed. Cas. No. 4042.

D. As Against Creditors of All Part Owners.—Where, however, the right to a lien arises not as between co-owners, one of whom rendered the services, or furnished the supplies, but between such part owner and a creditor of all the co-owners, the question is a different one. To hold that in such case the lien of the part owner would take priority over the claims of creditors would be to hold that one might have a lien on his own property and assert it against a debt for which he was individually liable: *Petrie v. The Coal Bluff No. 2*, 3 Fed. 531; *Logan v. The Aeolian*, 1 Bond, 267, Fed. Cas. No.

8465; *Pettit v. The Chas. Hemje*, 5 Hughes, 359, Fed. Cas. No. 11,047a; *Learned v. Brown*, 94 Fed. 876, 36 C. C. A. 524. The same principle controls where the vessel has been sold under execution against the owners. The lien of one of the part owners for his wages as a seaman cannot be asserted as against his vendee whether the latter takes by execution sale or voluntary deed: *Galatin v. The Pilot*, 2 Wall. Jr. 592, Fed. Cas. No. 5139, reversing as to this point, *Foster v. The Pilot No. 2*, 1 Newb. 215, Fed. Cas. No. 4980.

h. Accounts Between.

1. Actions at Law.—Ordinarily, the settlement of the accounts of part owners is a matter for which the flexible procedure of equity is peculiarly fitted, and over which it usually has jurisdiction. In certain cases, however, actions at law between part owners relating to the accounts between them have been permitted. Where the cause of action does not involve the taking of an account or the adjustment of debits and credits between the various co-owners, an action at law may be maintained. Thus a master, also a part owner, may sue his co-owners for the amount due him as master: *Dexter v. Munroe*, 2 Sprague, 39, Fed. Cas. No. 3863; or for breach of contract to employ him as master: *Moore v. Curry*, 106 Mass. 409. Compare *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105. So where an account has been settled and a balance struck, an action at law may be maintained for the recovery of the several proportions due each part owner: *McLauthlin v. Smith*, 166 Mass. 131, 44 N. E. 125. Where, however, the accounts have not been settled and an accounting is necessary, the proper remedy is by suit in equity: *Dodge v. Hooper*, 35 Me. 536; *Maguire v. Pingree*, 30 Me. 508; *Knowlton v. Reed*, 38 Me. 246; *Mustard v. Robinson*, 52 Me. 54; *Taylor v. Richards*, 3 Gray, 326. Compare *Magruder v. Bawie*, 2 Cranch C. C. 577, Fed. Cas. No. 8964; even though the relation of part ownership has terminated by the loss of the vessel: *Maguire v. Pingree*, 30 Me. 508. It seems that in Maine an action of account might be brought against a co-owner as receiver, where he has acted as agent of the vessel in receiving and disbursing its profits and expenses: *Jarvis v. Noyes*, 45 Me. 106. In accordance with the rule generally applicable where no accounting is necessary, it is held that each owner may maintain an action at law against a co-owner for his share of a sum paid the owners for the unlawful capture of the vessel. A bill in equity would there be improper, the amount being liquidated and the proportion settled: *Blood v. White*, 3 Cush. 416. See, also, *Gray v. Buck*, 78 Me. 477, 7 Atl. 16. Compare, however, *Milburn v. Guyther*, 8 Gill (Md.), 92, 50 Am. Dec. 681.

A suit in equity, rather than an action at law, is the appropriate method of compelling contribution between part owners for advances made by one of their number in excess of his share: *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232, 16 Atl. 302; *Hill v. Crocker*, 87

Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878; *Smith v. Butler*, 164 Mass. 37, 41 N. E. 60. Compare *Sheehan v. Dalrymple*, 19 Mich. 239. So where one of the part owners is the hirer of the vessel, or where a share in a boat is sold to one who had previously hired it, there can be no action at law on the contract of hiring, but the intervention of a court of equity to take an account is necessary: *Terry v. Brightman*, 132 Mass. 318; *Coster v. New York etc. R. Co.*, 6 Duer, 43. The rule that equity must be resorted to by part owners for the adjustment of their accounts applies to cases relating to the earnings and disbursements of the vessel, when no settlement has been made or account stated, but does not apply to cases of contract growing out of the original construction of the vessel, notwithstanding the builder is a part owner. The appropriate remedy on such a contract is an action at law: *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491.

2. In Admiralty.

A. Where the Accounting is the Sole or Principal Object of the Action.—In the absence of a statute conferring such jurisdiction on it, a court of admiralty has, it is well settled, no power to entertain an action, the main purpose, or one of the main purposes, of which is to adjust the accounts of part owners of vessels. Accounts between part owners are of equitable cognizance, and where their adjustment is the sole or principal object of the proceeding, a court of admiralty will not take jurisdiction. "Though a court of admiralty is not incompetent to take an account," it is said by Judge Curtis in *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7669, "it must certainly be admitted that its modes of proceeding have not been framed with any special reference to doing so, and that complicated accounts between part owners of vessels, and the rights of the parties dependent on them, can hardly be worked out satisfactorily in this jurisdiction. The whole machinery of references and exceptions, and the numerous rules of pleading and evidence and practice which courts of chancery have found necessary to secure the rights of parties in suits for accounts, do not exist in the admiralty, and would not, in my opinion, be a useful addition to its simple, direct and rapid modes of procedure." Whether the "abstemiousness" of the admiralty court in this respect is due to its inefficiency in the adjustment of accounts or not, the rule is well settled: *State ex rel. Gale v. Judge*, 7 La. 445; *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414; *The Orleans v. Phoebus*, 11 Pet. 175; *Lyman v. The H. E. Willard*, 52 Fed. 387; *Dodge v. Leary*, Fed. Cas. No. 3952 b; *Grant v. Poillion*, Fed. Cas. No. 5700; *Hall v. Hudson*, 2 Sprague, 65, Fed. Cas. No. 5935; *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7669; *The Larch*, 2 Curt. 427, Fed. Cas. No. 8085; *The Larch*, 3 Ware, 28, Fed. Cas. No. 8086; *The Marengo*, 1 Low, 52, 1 Am. L. Rev. 88, Fed. Cas. No. 9065; *Martin v. Walker*, Abb. Adm. 579, Fed. Cas. No. 9170; *The Ocean Belle*, 6 Ben. 253, Fed. Cas. No. 10,402; *Pettit v. The Chas. Hemje*, 5 Hughes, 359, Fed. Cas. No. 11,047a; *The Susan v. Voorhis*,

10 Ben. 380, Fed. Cas. 13,633; *Tunno v. The Betsina*, 5 Am. L. Reg. 406, Fed. Cas. No. 14,236; *United States v. The Isaac Haumett*, Fed. Cas. No. 15,446; *The Apollo*, 1 Hagg. Adm. 306.

B. Where Accounting is Incidental.—This rule does not, however, deprive admiralty of all jurisdiction over the accounts of part owners. Where the necessity for adjusting accounts arises incidentally, and is neither the sole nor a principal object of the suit, nor so involved as to render its settlement impracticable, the court will not deprive itself of all jurisdiction merely because an accounting is incidentally involved. The principle applicable is nowhere better expressed than by Judge Ware in *The Larch*, 3 Ware, 28, Fed. Cas. No. 8086: "When it is said that the admiralty has no jurisdiction over matters of account, the meaning I understand to be: 1. If the settlement of the account is the sole object of the suit, it is clear that the court has not jurisdiction, although it might have over each particular item; 2. When it is not the sole object, if it is apparent from the pleadings that this is one principal object, though not the sole one, and the accounts are long and intricate and multifarious, the court will decline to take jurisdiction. It will not, as observed by Lord Stowell, allow its jurisdiction to be used as a peg to hang a case upon which properly belongs to another forum. When the account arises incidentally, it has been pointedly said that the court holds itself bound to move within restricted limits. But it is very clear that the jurisdiction is not included by the simple fact of their being cross-demands. In all cases where there are such incidentally arising in a case, it is a question addressed to the sound discretion of the court whether it will take cognizance of the case or not, and to be determined by the general principles before stated." And to the same effect see *Swain v. Knapp*, 32 Minn. 429, 21 N. W. 414; *Pettit v. The Chas. Hemje*, 5 Hughes, 359, Fed. Cas. No. 11,047; *The Tunno v. Betsina*, 4 Am. L. Reg. 406, Fed. Cas. No. 14,236; *The L. B. Goldsmith*, Newb. Adm. 123, Fed. Cas. No. 8152.

C. Under English Statutes.—In England the limited jurisdiction of admiralty at common law, in the matter of accounts, has been so enlarged by statute that it now possesses full power to adjust all accounts between co-owners touching the earnings of the vessel. This enlargement of admiralty jurisdiction was effected by the admiralty court jurisdiction act of 1861, the text of which, so far as here relevant, has been already given (*supra* I, a, 8, C, (3)). This statute, it has been held, is not to be narrowed by any technical construction: *The Ceylon*, 18 L. T. 417; and under it a court of admiralty can take an accounting, although the relation of co-ownership between the parties has been terminated by the loss of the vessel: *The Ida*, Brown & L. 65; or by the sale of his shares in the vessel by one of the parties: *The Lady of the Lake*, 39 L. J. Adm. 40, L. R. 3 Ad. & E. 29, 21 L. T. 683, 18 Week. Rep. 528. The jurisdiction is, however, limited to the accounts of co-owners of vessels

registered in England or Wales: *The Robinsons and The Satellite*, 51 L. T. 905, 5 Asp. M. C. 338; nor will an account be ordered until a reasonable time for the managing owner to account has elapsed without his doing so: *The Mount Vernon*, 64 L. T. 148, 7 Asp. M. C. 32. See, also, generally in this connection, *The Chas. Jackson*, 52 L. T. 631, 5 Asp. M. C. 399, *The Eider*, 40 L. T. 463, 4 Asp. M. C. 104; *The Amphill*, 5 P. D. 224.

3. In Equity.—While, therefore, a court of law has, as we have seen, power to entertain actions between co-owners in a few cases where no accounting is necessary, and a court of admiralty may take an accounting where its necessity arises incidentally, where there is no statute affecting the matter, the ordinary forum for the adjustment of the accounts of part owners is neither in admiralty nor at law, but by a suit in equity: *State v. Judge*, 7 La. Ann. 449; *Maguire v. Pingree*, 30 Me. 508; *Knowlton v. Reed*, 38 Me. 246; *Mustard v. Robinson*, 52 Me. 54; *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232, 16 Atl. 302; *Hill v. Crocker*, 87 Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878; *Milburn v. Guyther*, 8 Gill (Md.), 92, 50 Am. Dec. 681; *Smith v. Butler*, 164 Mass. 37, 41 N. E. 60; *Whiton v. Spring*, 74 N. Y. 169; *Grant v. Poillion*, Fed. Cas. No. 5700; *Hall v. Hudson*, 2 Sprague, 65, Fed. Cas. No. 5935; *Kellum v. Emerson*, 2 Curt. 79, Fed. Cas. No. 7669; *The Marengo*, 1 Low. 52, 1 Am. L. Rev. 88, Fed. Cas. No. 9065. They are for this purpose regarded as the accounts of a quasi partnership: *Vanner v. Frost*, 39 L. J. Ch. 626. The part owners seeking an account must, of course, allege facts showing their right to it. A mere allegation that co-owners have had the sole possession of the vessel, without any showing that they have received earnings, or have refused to account, will not sustain a bill for an account: *Southworth v. Smith*, 27 Conn. 355, 71 Am. Dec. 72.

4. Joinder of Parties in Suit for Accounting.—The general rule in suits between part owners for an accounting is that all are to be made parties, in order that a final settlement of the part ownership accounts may be had, and the rights of all the owners determined: *Hyer v. Caro*, 17 Fla. 332; *Mudgett v. Gager*, 52 Me. 541; *Milburn v. Guyther*, 8 Gill (Md.), 92, 50 Am. Dec. 681. See, also, *Stimson v. Fernald*, 77 Me. 576, 1 Atl. 742. Where, however, some of the part owners have been settled with, they need not be made parties: *Mudgett v. Gager*, 52 Me. 541; *Whiton v. Spring*, 74 N. Y. 169. As to whether such a suit may be brought by one part owner on behalf of himself and the other part owners, see *Moffat v. Farquharson*, 2 Bro. C. C. 338, and note. In an action at law for breach of a contract between part owners, "each and every one with the others and each and every of the others," that a certain one should act as ship's husband and account for the proceeds of the voyage, each part owner has a separate interest and right of action, and need not join the others: *Owston v. Ogle*, 13 East, 538, 12 R. R. 426.

See, also, *Gray v. Buck*, 78 Me. 477, 7 Atl. 16. In a suit for an account between part owners all the parties are to be regarded as actors, and the decree should settle the net earnings between all the individual part owners, as if each were a plaintiff in a bill against the others: *Little v. Merrill*, 62 Me. 328.

III. Rights and Liabilities as to Third Persons.

a. Responsibility of Part Owner for Acts of Co-owner.

1. **In Purchase of Cargo.**—So far as the liability of part owners to third persons is concerned, the question most productive of difficulty and conflict is as to the right of one part owner to bind another by his purchase from or contracts with a third person. The general rule is well settled, and is a necessary result of the nature of the relation existing between part owners. They are, as has been already repeatedly stated, tenants in common of a chattel, and in general their rights and liabilities are the same as in the case of cotenants of other chattels. As a general rule, at least, no part owner is, by virtue of his mere part ownership, an agent of his co-owners, nor authorized to bind them by his contracts with third persons.

One part owner has, therefore, no power to bind his co-owners by the purchase of a cargo, nor by borrowing money for that purpose: *Oglesby v. The Steamer Stacy*, 10 La. Ann. 117; *Grant v. Poillion*, Fed. Cas. No. 5700; nor by effecting an insurance of the vessel, or the share of his co-owner: *Halcraft v. Wilkes*, 16 Ind. 373; *Patterson v. Chalmers*, 7 B. Mon. 595; *Woods v. Pickett*, 30 La. Ann. 1095; *Blanchard v. Waite*, 28 Me. 51, 38 Am. Dec. 474; *Sawyer v. Freeman*, 35 Me. 542; *Turner v. Burrows*, 8 Wend. 144; *Hooper v. Lusby*, 4 Camp. 66; *Lindsay v. Gibbs*, 4 Jur., N. S., 779, 6 Week. Rep. 733. Express authority to effect insurance may, of course, be conferred upon a part owner by his co-owners: *Lindsay v. Gibbs*, 3 De Gex & J. 690, 28 L. J. Ch. 692, 5 Jur., N. S., 376, 7 Week. Rep. 320, affirming 4 Jur., N. S., 779, 6 Week. Rep. 733; or his act in procuring it may be afterward ratified: *Blanchard v. Waite*, 28 Me. 51; or implied from a relation of partnership existing between the co-owners: *Hooper v. Lusby*, 4 Camp. 66. As to the authority of the ship's husband or managing owner to bind the part owners by a purchase of cargo or insurance, see post, III, a, 5, A.

2. **Contracts for Payment of Personal Debts from Earnings of the Vessel.**—One part owner will not be bound by a contract entered into between his co-owner and a third person, by which the earnings of the vessel are to go in extinguishment of a demand due from such co-owner. Such a contract is a fraud upon the part owner not consenting to the arrangement, and can bind neither him nor the vessel: *Jones v. Sims*, 9 Port. (Ala.) 236, 33 Am. Dec. 313; *The A. M. Bliss*, 2 Low. 103, Fed. Cas. No. 274; *Donovan v. Dymond*, 3 Woods, 141, Fed. Cas. No. 3993. Nor can a master who is also a part owner subject the vessel or his co-owners to liability for the

carriage of goods by signing a bill of lading before the goods are loaded on the vessel: *Montell v. The Wm. H. Rutan*, Fed. Cas. No. 9724.

3. Negotiable Instruments.—From the mere fact that certain persons are co-owners of a vessel, no authority on the part of one of them to bind the others by the issuance of negotiable paper arises. Proof of an express authority is here necessary: *Woods v. Pickett*, 30 La. Ann. 1095; *Wilkins v. Reed*, 6 Greenl. (Me.) 220, 19 Am. Dec. 211. See, also, *Oglesby v. The Steamer Stacy*, 10 La. Ann. 117. See, also, *Whiton v. Spring*, 74 N. Y. 169.

4. For Repairs and Supplies.

A. Doctrine That Co-owner Can Bind for.—The cases which are of the most frequent occurrence, and concerning which there is the sharpest conflict of authority, are as to the right of one owner to bind his co-owners in the purchase of necessary supplies and repairs.

A view taken by certain text-writers, notably by Abbott and by Kent, regards the purchase of necessary repairs and supplies as an exception to the general rule that part owners are not agents of each other, and recognizes an implied authority in a part owner by virtue of his part ownership to bind his co-owner by contracts of this nature. In Abbott on Shipping, 105, it is said that: "With regard to the repairs of a ship or other necessities for the employment of it, one part owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against." Chancellor Kent states the rule in no less positive terms: "As the law presumes that the common possessors of a valuable chattel will desire whatever is necessary to the preservation and profitable employment of the common property, part owners on the spot have an implied authority from the absent part owners to order for the common concern whatever is necessary for the preservation and proper employment of the ship. They are analogous to partners, and liable under that implied authority for necessary repairs and stores ordered by one of themselves, and this is the principle and limit of the liability of the part owners."

The authorities cited by Abbott in support of the proposition laid down by him hardly support the rule quoted: See Freeman on Co-tenancy and Partition, sec. 384, note 3; Parsons on Shipping and Admiralty, 97, note 2. While in a note appended to the passage above quoted from his Commentaries, Chancellor Kent refers to a previous note (3 Kent's Commentaries, 153, note d), "where the general rule at the common law is otherwise without there be ground to infer an agreement or consent": See 3 Kent's Commentaries, 155, note b.

The rule as laid down by the authors mentioned is not altogether without support among the cases. Many of the cases cited as sustaining the view that one part owner may bind the others for nec-

ecessary repairs and supplies will, on examination, be found to be cases in which the part owners were partners. In some the repairs were ordered by the master, and in others by a part owner, who was also the ship's husband. Many of the cases, moreover, rely upon the statements of Kent and Abbott to support the rule laid down: See, however, generally as taking this view, *Patterson v. Chalmers*, 7 B. Mon. 595; *Stedman v. Feidler*, 20 N. Y. 437; *Knox v. Campbell*, 1 Pa. St. 366, 44 Am. Dec. 139; *The Larch*, 3 Ware, 28, Fed. Cas. No. 8086; *Gleader v. Tinckler*, Holt, 586; *Thompson v. Freidens*, 4 Car. & P. 158; *Westerdell v. Dale*, 7 Term Rep. 306; *Wright v. Hunter*, 1 East, 20; *Perrott v. Willis*, 9 I. C. L. R. 338.

B. General Rule.—On principle and by the weight of authority, co-ownership is not of itself sufficient to raise a presumption of agency in one part owner to bind another, even for necessary repairs and stores. The liability of a part owner depends not upon the fact of part ownership, but upon the question whether the goods were supplied upon his order or upon the order of one whom he has expressly or impliedly made his agent to contract in such matters: *Benson v. Thompson*, 27 Me. 470, 46 Am. Dec. 617; *Hardy v. Sproule*, 31 Me. 171; *Bowen v. Peters*, 71 Me. 463; *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Whitwell v. Perrin*, 4 Com. B., N. S., 412; *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396; *Briggs v. Wilkinson*, 7 Barn. & C. 30, 9 Dowl. & R. 871, 5 L. J. K. B., O. S., 349; *Brodie v. Howard*, 17 Com. B. 109, 25 L. J. Com. P. 57, 33 Eng. Law & Eq. 146, 1 Jur., N. S., 1209. See, also, *Spedden v. Koenig*, 78 Fed. 504, 24 C. C. A. 189.

C. From What Fact Agency Implied—In General.—The difficulty arises in determining what facts are sufficient to raise an implication of agency in one part owner to bind his co-owners for repairs. "From the nature of the property there may be good reason for implying an agency more readily than in the case of other chattels owned in common. But to enable one part owner to bind another, something more than the fact of mere part ownership and that the repairs or supplies were reasonable or necessary must appear. There must be an agency of some sort or such circumstances as to preclude the part owner whom it is sought to charge from denying his liability": *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507.

An ostensible agency may arise when one part owner has been held out by his co-owners before the world as the ship's husband, or the managing owner: *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507; *Brodie v. Howard*, 17 Com. B. 109, 25 L. J. Com. P. 57. Such ostensible agency cannot, however, operate in favor of parties who had no dealings with the ostensible agent as such prior to the revocation of his authority to act for the other part owners: *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507. See as to the power of a part owner, who is also ship's husband, to bind his co-owners for repairs, post, III, a, 5, B; and as to the effect of a revocation of his authority as ship's husband, post, III, a, 6.

D. Where Vessel is in Home Port.—In a number of the cases a distinction is made between the right of a part owner to bind his co-owners for the vessel when abroad and when in a home port. "The reason is obvious. A ship far from its home might perish for want of aid which was delayed till all the owners could be consulted. But if at home, all who will have to pay have an unquestionable right to be consulted. It is not, however, quite certain whether the fact that a vessel is in the home port, which certainly limits these powers, goes so far as to destroy them. In other words, the question whether one part owner can bind another in a home port without specific authority may be regarded as still open": 1 Parsons on Shipping and Admiralty, 101. So far as this implies that one part owner, as part owner merely, can bind his co-owners for repairs, it is contrary to the weight of authority. The fact that the repairs were made in a home port, where all the owners might have been consulted, is, however, a fact insisted on in some of the opinions, particularly in those of the Maine cases, and the rule that a part owner cannot, without authority other than that derived from his co-ownership, bind a co-owner for repairs as applicable only to necessary repairs, etc., ordered in a home port: *Benson v. Thompson*, 27 Me. 470, 36 Am. Dec. 617; *Hardy v. Sproule*, 31 Me. 71; *Thomas v. Ellis*, 4 Harr. (Del.) 309. See, also, *Bowen v. Peters*, 71 Me. 463.

In *Bowen v. Peters*, 71 Me. 463, the former Maine cases taking this view are reviewed, but it is held that an implied authority in the part owner in possession to bind his co-owners for repairs exists unless there are facts to show the contrary, even though the repairs are made in the home port. The court uses the following language: "We think it is true, as a general proposition, that a part owner of a vessel, in undisputed possession, will be regarded as having implied authority to bind the other owners for things necessary for the vessel and its employment, unless the evidence discloses something to indicate that such implication of agency is contrary to the fact. . . . The authority of one, whose possession is acquiesced in, to act to this extent for all, is the proper inference from existing facts, unless in a particular instance something appears to limit or disprove it. As to one who furnishes materials to make the vessel seaworthy, upon the order of a part owner in such possession, even if it be in the home port, the presumption remains, unless there is something more than the single fact of the place of registry or enrollment, or of the owner's residence, to remove it."

5. Where Co-owner Acts as Ship's Husband.

A. Generally.—Where a vessel is owned by several part owners, it is usual to appoint a person to act as their general agent in the management of their ship, and such a person is known as a ship's husband, or managing owner. In the majority of cases, perhaps, the ship's husband is himself a part owner, but this is by no means

essential: Abbott on Shipping, 14th ed., 130; and the fact that a ship's husband is at the same time a part owner confers no greater or different authority on him as ship's husband than he would otherwise possess. It is not, therefore, intended to here consider the powers and duties of managing owners at any great length.

One who is a part owner has, as we have seen (*supra*, III, a, 3), no power merely as such to insure the vessel or the shares of his co-owners. Nor is such authority conferred upon him by virtue of an appointment as ship's husband: *Gould v. Stanton*, 17 Com. 377; *The Ole Oleson*, 20 Fed. 384; *French v. Backhouse*, 5 Burr. 2727; *Hooper v. Lusby*, 4 Camp. 66; *Bell v. Humphries*, 2 Stark. 345. He may purchase an outfit for a vessel to enable it to carry on business: *Hall v. Thing*, 23 Me. 461; but has no authority to bind his co-owners by the purchase of a cargo: *The Ole Oleson*, 20 Fed. 384. Nor is he authorized to borrow money and thereby render his co-owners liable for the amount: *Arey v. Hall*, 81 Me. 17, 10 Am. St. Rep. 232, 16 Atl. 302; *The Ole Oleson*, 20 Fed. 384; *Harris v. Reynolds*, 4 Week. Rep. 278. He has certainly not such power where the object of the transaction is the removal of an indebtedness previously incurred: *Chase v. McLean*, 130 N. Y. 522, 29 N. E. 986. He may, it seems, act for his co-owners in procuring bail to release the vessel from attachment on a debt or liability for which all the owners were liable: *Barker v. Highley*, 15 Com. B., N. S., 27, 32 L. J. Com. P. 270, 10 Jur., N. S., 391, 9 L. T. 228; but not where the attachment is in a home port and the other part owners were not personally liable for the debt on which the attachment issued: *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167, 5 N. W. 57.

B. For Repairs and Supplies.—One of the principal objects of the appointment of a managing owner is the necessity of keeping the vessel properly manned, equipped and repaired. He may, therefore, it is quite uniformly held, purchase necessary supplies and order necessary repairs to be made, and his act will bind the co-owners who have appointed him their agent: *Hall v. Thing*, 23 Me. 461; *Schemerhorn v. Loines*, 7 Johns. 311; *Bell v. Humphries*, 2 Stark. 345; *The Huntsman* (1894), P. 214, 6 R. 698, 70 L. T. 386; *Whitwell v. Perrin*, 4 Com. B., N. S., 412; *Tolson v. Hallett*, Amb. 269; *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396. Some of the cases here make a distinction previously adverted to in connection with the right of a part owner as such to bind his co-owners for repairs and supplies (*supra*, III, a, 4); and limit the power of a ship's husband in the purchase of such articles, to cases where they become necessary in a foreign port. According to these cases, a ship's husband or managing owner cannot bind his co-owners for repairs made or stores purchased in the home port: *Benson v. Thompson*, 27 Me. 470, 46 Am. Dec. 617; *Hill v. Crocker*, 87 Me. 208, 47 Am. St. Rep. 321, 32 Atl. 878. *Contra*, *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507.

6. Where Part Owner Dissents from Voyage, or Revokes All Authority of Co-owner.

A. As Between Co-owners.—As between part owners, or a ship's husband and his co-owners, any authority which one may have to bind the others is of course a revocable one. Where the rights of third persons are not concerned, neither a part owner nor ship's husband can subject his co-owner to a liability where his authority to do so has been revoked directly or by a dissent of such co-owners from the adventure on which the liabilities were incurred. Neither can, therefore, have contribution for money paid as an expense incurred against the expressed dissent of a co-owner: See *Hardy v. Sproule*, 31 Me. 71; *Elder v. Larrabee*, 45 Me. 590, 71 Am. Dec. 567; *Scull v. Raymond*, 18 Fed. 547; *Revens v. Lewis*, 2 Paine, 203, Fed. Cas. No. 11,711; *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396; *The Vindobala*, 58 L. J. Adm. 51, 14 P. D. 50, 60 L. T. 657, 37 Week. Rep. 409, 6 Asp. M. C. 376. Notice to the other co-owners of the revocation of authority of the ship's husband by a part owner is not necessary to release the latter from liability as between the co-owners, for the acts of the person whose authority is revoked: *The Vindobala*, 58 L. J. Adm. 51, 14 P. D. 50, 60 L. T. 657, 37 Week. Rep. 409, 6 Asp. M. C. 376.

B. As Between Part Owner and Third Person with Knowledge.—As between a part owner whom it is sought to hold for the act of a co-owner, and a third person with whom such co-owner dealt, the part owner is not responsible for the acts of his co-owner (even where an agency would otherwise be implied) if the third person had knowledge of facts which tend to remove the presumption that the owner who gave the order was authorized to act for the other. Thus, in *Elder v. Larrabee*, 45 Me. 590, 71 Am. Dec. 567, there was not only a denial by the defendant part owner of the authority of his co-owner to act for him, but the person making the repairs had lately been a part owner with the defendant, and knew that the defendant had recently repaired the vessel, had acted as ship's husband until within a few days of the time of the repairs, and then appointed a master and sent her to sea. With knowledge of these facts the plaintiff made repairs to the vessel on the order of defendant's co-owner, who had displaced the captain appointed by defendant without the latter's consent. The court held that it was the duty of the plaintiff, under such circumstances, before attempting to charge the defendant, to ascertain whether he desired the repairs to be made, or at least to see that he had knowledge that they were to be made.

C. Necessity of Notice to Third Person of Dissent, or Revocation of Authority.—Even, however, as between one part owner and a third person who has furnished supplies or repairs on the order of a co-owner, who assumes to act as agent for the other owners, it seems to be the rule, supported at least by the weight of authority, that

no express notice of dissent or revocation of a co-owner's authority need be communicated to a third person in order to relieve the part owner dissenting from liability to the third person for the acts of the co-owner. This question was considered at some length in *Brodie v. Howard*, 17 Com. B. 109, 25 L. J. Com. P. 57, 33 Eng. Law & Eq. 146, 1 Jur., N. S., 1209, and the rule obtaining in the case of partnership is declared entirely inapplicable to the case of part owners. In the opinion of Williams, J., this conclusion is thus stated: "It is well established that part owners of a ship are not in the position of ordinary partners. It is true they resemble partners in respect of the concerns of the ship to this extent, that, generally speaking, all are liable for repairs and other necessary expenses, which are shown or may be presumed to have been incurred with their assent. But their position differs from that of ordinary partners in this, that the authority which one part owner gives to another to act as his agent is not an authority that is necessarily incident to their relation as in the case of partners. It is in vain for a man to repudiate the authority of his partner to bind him by his contracts, unless that repudiation is communicated to those with whom the firm has dealings. There is no authority to show that any such rule holds as to part owners of a ship."

In line with this case and with what seems to be the weight of authority generally, the rule is thus laid down in *Freeman on Co-tenancy and Partition*, 384: "1. That each part owner of a ship has the right to expect that the other part owners will concur with him in obtaining necessary supplies and in making necessary repairs; and that if he alone orders such supplies or repairs, they expressing no dissent, they as well as he will be held liable therefor; 2. That if any one of the part owners has notified the others that he will not join in making such repairs or procuring such supplies, he cannot be held responsible therefor; and 3. That all persons dealing with a part owner must ascertain, at their own peril, whether the other part owners have, by a notice such as has just been referred to, revoked the implied authority under which each part owner is authorized to act for all." As supporting this view, see *Atkins v. Lewis*, 168 Mass. 534, 47 N. E. 507; *Stedman v. Feidler*, 20 N. Y. 437; *Adams v. Carroll*, 85 Pa. St. 209; *Seull v. Raymond*, 18 Fed. 547; *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396; *Brodie v. Howard*, 17 Com. B. 109, 25 L. J. Com. P. 57, 1 Jur., N. S., 1209.

In Maine a different view seems to be taken, and the cases in that state would appear to require that notice of dissent by a part owner be brought home to a third person who has supplied goods or made repairs on the order of a co-owner in order to release the dissenting part owner from liability. In *Hardy v. Sproule*, 29 Me. 258, it appeared that the plaintiff had been hired as a seaman by a master employed by a co-owner of defendant, before the plaintiff had rendered the services, while defendant had forbade either the

master or his co-owner from having anything to do with the vessel. The court held the defendant liable on the ground that plaintiff had no knowledge of defendant's dissent, and without such knowledge the plaintiff would have the right to suppose himself employed by the consent and for the use of all the part owners. In *Bowen v. Peters*, 71 Me. 463, also language is to be found indicating that the knowledge of the creditor that the defendant part owner has dissented or revoked the authority of his co-owners is necessary. In that case, however, there was no evidence of dissent on the part of defendants, and the language referred to was a mere dictum.

The mere fact that a person appears upon the register as "managing owner" does not make him, as to third persons, the agent of an owner who did not concur in his appointment or who has dissented from the adventure, and denied the person so registered any authority to act for him. "It is perfectly true that a managing owner is a name which frequently and commonly denotes an owner to whom the other owners have delegated the management of a vessel. But I do not think it follows as of course that every single other owner must be taken to have joined in the adventure merely because there is an owner called a managing owner. . . . An advertisement that A B is managing owner of a vessel seems to me to mean no more than that as owner he is intrusted by such of the owners as are interested in the ship's employment to manage her affairs. An entry to a like effect upon the register does nothing more. A managing owner registered under the act is no more and no less than a managing owner before the act. He binds those whose agent he is; he binds nobody besides": *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277, 6 Q. B. D. 93, 29 Week. Rep. 396.

D. What Amounts to Revocation of Authority.—In order that one part owner may relieve himself from responsibility for the acts of one of his co-owners, he must, of course, bring his dissent to the notice of such co-owner: *Bowen v. Peters*, 71 Me. 463. He need not, however, notify all the part owners that he has withdrawn authority from a ship's husband to act for him: *The Vindobala*, 58 L. J. Adm. 51, 14 P. D. 50, 60 L. T. 657, 37 Week. Rep. 409, 6 Asp. M. C. 376. Nor is it essential, in order that one part owner, dissenting from a voyage, may not be liable to third persons furnishing the vessel supplies, that he take a stipulation in admiralty for the vessel's safe return. "In such a proceeding, the owners are the sole parties, and the security sought for and obtained is against the loss of the interest of the co-owner in the vessel. No more notice is given to third persons by such a proceeding than by the dissent, except by the proceedings, which are of very little moment to strangers in a foreign port. Knowledge by any such, who furnish supplies, has never been deemed material": *Stedman v. Feidler*, 20 N. Y. 437.

If a part owner is excluded from all participation in the management of a vessel, and acquiesces in such exclusion, or dissents

from a particular voyage, he is not liable as principal for the torts of the master. Where the liability on which it is sought to hold a part owner as principal is for the tort of an alleged agent, no question of an innocent third person dealing with such agent without notice of the dissent can arise: *Scull v. Raymond*, 18 Fed. 547. In *Grant v. Carver*, 75 Me. 524, it is held that the death of one co-owner does not revoke as to his share the authority of the ship's husband or the master. In *Stedman v. Feidler*, 20 N. Y. 437, on the other hand, the death of one owner is said to revoke any authority of his co-owner to purchase supplies and he cannot by such purchase bind the estate of the deceased part owner.

b. Who Liable as Part Owner.

1. General Rule—Legal Title Controls.—As a general rule, the person holding the beneficial title to a share in a vessel is liable as a part owner. Parties who have conveyed their beneficial interest in the vessel so that they have no right to profits are, therefore, no longer liable for repairs ordered by a managing owner after the contract of sale was made: *Curling v. Robertson*, 8 Scott N. R. 12, 7 Man. & G. 336, 13 L. J. Com. P. 137. So, where a managing owner mortgages his share, but continues in the management as before, and the mortgagee neither takes possession of nor interferes with the vessel, the mortgagee is not liable for repairs and necessities supplied on the orders of his mortgagor: *Briggs v. Wilkinson*, 7 Barn. & C. 30, 9 Dowl. & R. 871, 5 L. J. K. B., O. S., 349. Where, however, the mortgagees are registered as owners, they are liable to creditors for supplies furnished for the use of the vessel: *Ex parte Machell*, 1 Rose, 447, 2 Ves. & B. 216. Where the party whom it is sought to charge is not the owner of a share either in law or equity, as where he bought a share which the alleged vendors were not entitled to sell, he cannot be held liable for the acts of the managing owner: *The Bonnie Kate*, 57 L. T. 203, 6 Asp. M. C. 149.

2. Part Owner Holding Share at Time of Transaction.—Where there has been a change in the ownership of certain shares, the persons owning the shares at the time of a particular transaction are, as a general rule, the parties who are subject to any liability incurred or any profit earned thereby. A part owner is not, therefore, liable for a charge incurred before he became part owner; as, for instance, for a portion of the commission paid to a broker for procuring a charter for the vessel: *Rennel v. Kimball*, 87 Mass. (5 Allen) 356. So a master, although a part owner, cannot settle with the ship's husband an account which arose before certain parties became owners, and allow the ship's husband to retain the balance found due him, on such account, out of the proceeds of a voyage made after such parties became owners: *Donnell v. Walsh*, 6 Bosw. (N. Y.) 621; affirmed, 33 N. Y. 43, 88 Am. Dec. 361. Conversely, payments made by the part owners after a certain part owner has sold his interest, unless made by him or on his ac-

count, cannot be applied by him to debts incurred while he was a part owner: *Adams v. Carroll*, 85 Pa. St. 209.

In *The Meredith*, 10 P. D. 69, 52 L. T. 520, 5 Asp. M. C. 400, a vessel had been sent out under a time charter, but this had been broken and was being sent home under a voyage charter. A party purchasing during the homeward voyage was held not liable for losses incidental to the voyage out under the time charter. One who purchases shares in a vessel during a voyage is, however, ordinarily liable for the expenses and entitled to the profits of that voyage: *The Vindobala*, 13 P. D. 42. In line with the principle of these cases it is held that where part owner sells his share, the vendor must be joined as plaintiff with the other owners to enforce a contract entered into during his part ownership: *Coster v. New York etc. R. Co.*, 6 Duer, 43; and must be joined as defendant in an action against the representatives of his vendee to collect a debt incurred while both were part owners: *Pierson v. Robinson*, 3 Swanst. 139. See, also, in this general connection, *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842; *Violett v. Fairchild*, 6 La. Ann. 193.

3. Secret Part Owners.—Where one part owner has authority to bind another, a third party dealing with the former, without knowledge of the existence of the other, may, on learning of the fact, hold the other: *Thompson v. Finden*, 4 Car. & P. 158. There is a clear distinction, however, as is said in *Perrott v. Willes*, 9 L. C. L. R. 338, “between such a case and that of mere principal and agent, for in the latter case the vendor can only elect to sue one or other of the two; but, in the case of part owners, he may, if he choose, sue the part owner alone with whom he dealt, or he may sue both part owners jointly; but he cannot sue the part owner with whom he did not deal, separately, unless subject to his pleading in abatement the nonjoinder of the other part owner.” A part owner who orders supplies on his own account without mentioning any co-owners cannot, however, plead in abatement that there are other co-owners who should have been joined in the action, where the plaintiff vendor was ignorant that there were such other owners: *Baldney v. Ritchie*, 1 Stark. 338. Nor can a secret part owner of a vessel and cargo compel a supercargo to account to him, where he was ignorant of the part owner’s interest, and had accounted to the ostensible owner, retaining a sum due him from the latter out of the proceeds of the voyage: *Luckett v. West*, 4 Cranch C. C. 101, Fed. Cas. No. 8593.

c. Extent of Liability.

1. In France and Louisiana.—Under the French law a part owner, liable as such to third persons, is responsible only for his proportion of the debt. Part ownership merely gives rise to no solidary liability, it being regarded as “neither agreeable to natural equity nor

public utility that each part owner should be bound in solido, or beyond his share": See 3 Kent's Commentaries, 156; Story on Partnership, sec. 456.

In this respect the Louisiana law resembles the French law, and part owners are not liable in solido merely by reason of their part ownership. Mr. Justice Porter, in delivering the opinion of the court in *David v. Elai*, 4 La. 106, says: "By the statutes of the majority of the commercial nations of Europe, owners of vessels are discharged from all responsibility by surrendering their interest in them. This court does not profess to understand how the part owner of a ship, who can free himself from responsibility for a debt which may be ten times as great as his share in the vessel, can be considered as personally liable in solido for the whole debt. It thinks with Emerigon that his obligation is more real than personal, and that it depends on the amount of interest he has in the vessel, not on an obligation in solido as joint owner, whether he is bound for the whole amount of a debt contracted by the master." To the same effect, see *Carroll v. Waters*, 9 Mart. (La.) 500, 13 Am. Dec. 316, and note, p. 320; *Kimbal v. Blanc*, 8 Martin, N. S., 386; *Bent v. Lauve*, 3 La. Ann. 88.

Where, however, under the law of Louisiana, part owners engage in the carrying of passengers or property for hire, they constitute themselves, as we have seen (*supra*, I, c, 3, D), commercial partners, and as such are liable in solido for all debts contracted in pursuing the business of such partnership: *Byrne v. Hooper*, 2 Rob. (La.) 229; *Burke v. Clarke*, 11 La. 206; *Vigers v. Sainet*, 13 La. 300; *Lacoste v. Sellerk*, 1 La. Ann. 336; *Shirley v. Steamer Bride*, 5 La. Ann. 260; *Woods v. Pickett*, 30 La. Ann. 1095.

2. **At Common Law.**—The common law, resembling in this the law of Rome (see *David v. Eloi*, 4 La. 106), when once the liability to third persons of part owners as such is established, makes each part owner liable in solido for the debt, without reference to the amount or proportion of his interest in the vessel. Whatever may be the rights of the owners between themselves, each is responsible to the creditor for the entire amount of the debt: *Jones v. Pitcher*, 3 Stew. & Port. 135, 24 Am. Dec. 716; *Robertson v. Stuart*, 68 Me. 61; *Spring v. Haskell*, 14 Gray, 309; *McDonald v. Black*, 20 Ohio, 185, 55 Am. Dec. 448; *Hopkins v. Forysth*, 14 Pa. St. 34, 53 Am. Dec. 513; *National Board of Marine Underwriters v. Melchers*, 45 Fed. 643; *Warner v. Boyer*, 74 Fed. 873; *Gallatin v. The Pilot*, 2 Wall. Jr. 592, Fed. Cas. No. 5199; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Doddington v. Hallet*, 1 Ves. Sr. 498; *Passmore v. Bonsfield*, 1 Stark. 297. It has been said that a "court of equity would distribute the liability ratably": See note to *Carroll v. Waters*, 13 Am. Dec. 320, quoting *Maude & Pollock on Shipping*, 67. This probably means no more than that the part owner compelled to pay the entire amount of a debt for which

all the part owners were jointly liable might compel contribution in equity from his co-owners. In *United Ins. Co. v. Scott*, 1 Johns. 106, it was held that insurers who had underwritten separately, and had accepted an abandonment of the vessel were liable only for their proportion of the necessary expense of repairing the ship, the proportion of the insurance taken by each to the whole amount of insurance being the basis of apportionment of such expense. In the case of a conflict of laws as to whether part owners are liable in solido, or merely in proportion to the interest held by them, the law of the place of making the contract out of which the debt arose controls: *Bent v. Lauve*, 3 La. Ann. 88.

3. **Under United States Statutes.**—This rule of the common law imposing a solidary liability upon the part owners of vessels has been changed by a statute of the United States: Act of June 26, 1884, c. 121, sec. 18. By this it is provided: "That the individual liability of a ship owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending; provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by such ship owners."

This statute, it has been held in limiting the liability of part owners for debts to the proportion of the vessel held by each, restricts only the liability imposed upon them as owners, and does not apply where they contract to be liable for the entire amount, or on their personal contracts generally. Where, therefore, a corporation acting as a managing owner signed a charter-party without therein disclosing its agency, or the interest or identity of the other owners, the statute was deemed inapplicable and the corporation was held liable for the entire amount of the liability for breach of the charter-party: *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89. See, also, *The Amos D. Carver*, 35 Fed. 665; *McPhail v. Williams*, 41 Fed. 61; *Gokey v. Fort*, 44 Fed. 364. Where the supplies were purchased by a ship's husband, the liability of the owners arises out of their character as such, and is not a personal liability by agency. It is, therefore, within the provisions of the statute: *Warner v. Boyd*, 74 Fed. 873. The proceeds of a cruising season of a fishing vessel is freight pending within the meaning of the statute: *Whitcomb v. Emerson*, 50 Fed. 128.

By another and an earlier act (Rev. Stats. 4283, Act of March 3, 1851, c. 43, sec. 3, 9 Stats. 635), the liability of the owner of any vessel for the embezzlement, loss or destruction of an article carried, or for injury by collision or for any act done without the

privity or knowledge of such owner, "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." This statute, it has been held, does not change the rule that the owners are jointly liable in the cases covered by the statute. The value of the interest of an owner in the vessel, within the meaning of the statute, is not lessened because encumbered by a mortgage, and is the value of the share immediately before the tort out of which the liability arises, this amount being unaffected by a subsequent loss of the vessel: *Spring v. Haskell*, 14 Gray, 309.

d. What Discharges Part Owner.

1. **Dealing by Creditor with Co-owner.**—Where several persons are jointly liable to a creditor, a release by the creditor of one of their number releases the others. Part owners are no exception to the rule, and where their liability is joint, any action of the creditor which releases one part owner operates to release his co-owners: *Houston v. Darling*, 16 Me. 413.

The creditor may, of course, deal with but one of the part owners, and rely upon his exclusive credit: *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933. Such an exclusive credit, it was said by Tindal, C. J., in *Thompson v. Finden*, 4 Car. & P. 158, "would be a giving up of the owners generally, and the making an exclusive bargain with the person who orders the goods and an agreement to furnish them on his credit only."

In Massachusetts it has been held that the receipt by the creditor from one of several part owners of a promissory note for the amount of a bill of supplies amounts to a discharge of the other part owners. This rests, however, upon the peculiar doctrine of the Massachusetts courts, that the receipt by the creditor of a negotiable note is presumed to be payment of the debt which furnishes the consideration for the note: *Chapman v. Durant*, 10 Mass. 47; *French v. Price*, 24 Pick. 13.

The rule generally followed is otherwise, and while it is undoubtedly true that a promissory note, if treated by the parties as amounting to payment, will be given this effect by the courts, and its receipt will discharge the co-owners of the person giving it (*Macy v. DeWolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933), the presumption is that it was received as conditional payment only, and unless it is paid at maturity will not discharge the other part owners: *Muldon v. Whitlock*, 1 Cow. 290, 13 Am. Dec. 533; *Schemerhorn v. Loines*, 7 Johns. 311; *Macy v. De Wolf*, 3 Wood. & M. 193, Fed. Cas. No. 8933; *Keay v. Fenwick*, 1 C. P. D. 745; *Mould v. Andrews*, 35 L. T. 813, 3 Asp. M. C. 329; *Whitwell v. Perrin*, 4 Com. B., N. S., 412; *The Huntsman* (1894), P. 214, 70 L. T. 386, 6 R. 698, 7 Asp. M. C. 431. Similarly, a receipt in full given by the creditor to the ship's husband may be denied, and does not discharge the co-owners: *Tolson v.*

Hallet, Amb. 269. The rule that a receipt of a note from one part owner does not presumptively release his co-owners, while perhaps fortified somewhat where the facts show that the creditor at the time did not know of the other part owners: *Schemerhorn v. Loines*, 7 Johns. 311 (see, also, *Perrott v. Willis*, 9 I. C. L. R. 388), does not by any means depend upon that circumstance: *Muldon v. Whitlock*, 1 Cow. 290, 13 Am. Dec. 533.

2. Settlement of Accounts Between Co-owners.—Where by his conduct in dealing with one part owner, the creditor has led the co-owners into settling their mutual accounts on the basis of his having taken the exclusive credit of the owner, the creditor cannot afterward seek to hold the other owners liable. If, for instance, by giving one owner a receipt in full, or by accepting his note, he has led the co-owners into believing the debt paid or their responsibility to the creditor waived, and on the faith of this there has been a settlement of accounts, the co-owners will not be responsible in the event that their belief proves to be unfounded: *Tolson v. Hallet*, Amb. 269; *Perrott v. Willis*, 9 I. C. L. R. 338; *Reed v. White* (distinguished in *Muldon v. Whitlock*, 1 Cow. 290, 13 Am. Dec. 533; *Schemerhorn v. Loines*, 7 Johns. 311).

Unless there has been such an alteration of accounts between the part owners, mere delay on the part of the creditor will not discharge the co-owners: *Tolson v. Hallet*, Amb. 269. Nor will an alteration of accounts be sufficient unless it was induced by the act of the creditor. "The rule of law is this, that if there exist an original liability in two joint contractors, or in the case of principal and agent, that in either case the acts of these two parties behind the back of their creditor will not deprive the latter of their rights, and that although their condition be altered with regard to each other, the creditor is not to be affected thereby, unless that alteration in their position be the result of his act": *Perrott v. Willis*, 9 I. C. L. R. 338.

e. Actions by or Against Third Persons.

1. Joinder of Parties.—Where part owners enter into a contract joint in its nature, they must join in an action upon it, and an action for the employment of the vessel or for freight is ordinarily of this nature: *Robinson v. Cushing*, 11 Me. 480; *Coster v. New York etc. Ry. Co.*, 6 Duer, 43; *Merrit v. Walch*, 32 N. Y. 685; *Abbott on Shipping*, 14th ed., 146; *Collyer on Partnership*, sec. 1230; *Story on Partnership*, sec. 454. Each may, it is held, sue the ship's husband for his proportion of the freight: *Magruder v. Bowie*, 2 Cranch C. C. 577, Fed. Cas. No. 8964; while, on the other hand, each is liable to a suit by the ship's husband for his proper proportion of the expenses advanced by the latter: *Helme v. Smith*, 7 Bing. 709, 5 Moore & P. 744, 9 L. J. Com. P., O. S., 206. The interest of each part owner in the vessel being distinct and separate, they need not join even in an action against another part owner to recover money collected by him

as insurance on their shares: *Gray v. Buck*, 78 Me. 477, 7 Atl. 16; *Ohl v. Eagle Ins. Co.*, 4 Mason, 172, Fed. Cas. No. 10,472, 4 Mason, 390, Fed. Cas. No. 10,473. Although where the party procuring the insurance did so on the joint account and authority of the owners, all should, it seems, be joined as plaintiffs in an action against such person for failure to pay over the insurance: *White v. Curtis*, 35 Me. 534. Part owners who have already received their share need not be joined: *Bishop v. Edmiston*, 16 Abb. Pr. 466 (reversing judgment, 13 Abb. Pr. 346).

In general, where all the part owners join in giving an authority to a third person, in an action thereon they should join as plaintiffs: *Hatsall v. Griffith*, 2 Car. & M. 679, 4 Tyr. 487, 3 L. J. Exch. 191; and should be joined as defendants: *Keay v. Fenwick*, 1 C. P. D. 745; while if the covenant or contract run to each part owner severally, there not only need not, but cannot, be a joint action: *Servante v. Jaines*, 5 Moody & R. 299, 10 Barn. & C. 410, 8 L. J. K. B., O. S., 64. Where one or more of the part owners was not known to the third person at the time he dealt with their co-owner, he may sue the latter alone, or may, if the others were bound by the acts of their co-owner, sue all the owners jointly: *Perrott v. Willis*, 9 I. C. L. R. 338. For an injury to the common property all should join: *Buckman v. Brett*, 22 How. Pr. 233; *The Richard Doane*, 2 Ben. 111, Fed. Cas. No. 11,765; *Addison v. Overend*, 6 Term Rep. 766; but if advantage of their nonjoinder is not taken by plea in abatement, the remaining co-owners may sue for their part. The one who sued first need not be joined as plaintiff in this second suit, he having already received satisfaction of his claim: *Sedgworth v. Overend*, 7 Term Rep. 278. A court of admiralty will entertain an action by one part owner against a mere unlawful possessor, the nonjoinder of the others in such case not being fatal: *The Friendship*, 2 Curt. 426, Fed. Cas. No. 5123. In an action against part owners on a liability arising out of a tort, each may be sued separately: *Jones v. Pitcher*, 3 Stew. & P. 135, 24 Am. Dec. 716. The joinder of parties in actions for an accounting between part owners has already been considered, *supra*, II, h, 4.

If during an action by or against the part owners of a vessel jointly one of the part owners dies, in neither case do the personal representatives of the decedent become parties to the action, but it is carried to a conclusion by or against the survivors. The reason for the rule where part owners are plaintiffs is the inconvenience resulting where persons suing in their own right are united as plaintiffs with those suing in a representative capacity. In case the judgment was for the defendants, the liability of the various plaintiffs for costs would be different: *Buckman v. Brett*, 22 How. Pr. 233; while in the case of defendant part owners the impracticability of making the executors liable *de bonis testatoris* and the other defendants *de bonis propriis* is evident: *Wright v. Marshall*, 3 Daly, 331. The action having been carried to completion by or against the survivors, the latter are liable to account to the representatives of the

deceased part owner for his share of the judgment recovered; or if the result was adverse are entitled to contribution from them for the deceased's proportion of the expenses: *Buckman v. Brett*, 22 How. Pr. 233; *Wright v. Marshall*, 3 Daly, 331.

2. Objections to Nonjoinder—How Taken.—If there be a defect in the joinder of part owners, the objection must, it is well settled, be taken by plea in abatement, if at all: *Jones v. Pitcher*, 3 Stew. & P. 135, 24 Am. Dec. 716; *Kerry v. Pacific Marine Co.*, 121 Cal. 564, 66 Am. St. Rep. 65, 54 Pac. 89; *Nickerson v. Spindell*, 164 Mass. 25, 41 N. E. 105; *Paine v. Silva*, 168 Mass. 432, 47 N. E. 118; *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167, 5 N. W. 57; *Merrit v. Walch*, 32 N. Y. 685; *Addison v. Overend*, 6 Term Rep. 766; *Banardiston v. Chapman*, 4 East, 121; *Kemp v. Andrews*, 2 Lev. 290, Carth. 170; *Perrott v. Williss*, 9 I. C. L. R. 338; *Sedgworth v. Overend*, 7 Term Rep. 278. The objection is not available by a motion in arrest of judgment: *Addison v. Overend*, 6 Term Rep. 766; nor on the general issue: *Banardiston v. Chapman*, 4 East, 121. In New York, under the code, the nonjoinder must be taken advantage of by demurrer or answer: *Donnel v. Walsh*, 19 N. Y. Sup. Ct. (6 Bosw.) 621, affirmed 33 N. Y. 43, 88 Am. Dec. 361; *Merrit v. Walch*, 32 N. Y. 685. See, also, in this connection, *Abbott on Shipping*, 14th ed., 146.

3. Attachment of Part Owner's Share.—The undivided interest of a part owner in a vessel, while it cannot, it is held, be made the object of an action in rem in admiralty: *Manhattan Fire Ins. Co. v. Breed*, 1 Flip. 655, Fed. Cas. No. 9021; may be attached by a creditor: *Buddington v. Stewart*, 14 Conn. 404; *Thorndike v. De Wolf*, 6 Pick. 120. In this the interest of a tenant in common of a ship is not different from that of other tenants in common. The attachment of the share of one owner cannot affect the rights of his co-owner, and the latter may employ the vessel on giving security to the attaching officers for its safe return: *Buddington v. Stewart*, 14 Conn. 404; *Williams v. Brooks*, 2 Root (Conn.), 34. Where one part owner gives a bond to dissolve an attachment on a vessel levied for the debt of his co-owner, he need not account to the latter for the earnings of the vessel while the attachment is pending, and, if compelled to pay the judgment, he is entitled to the earnings, and may hold the share as security for the amount paid: *Call v. Perkins*, 55 Me. 517; *Taylor v. Richards*, 3 Gray, 326.

Where a vessel is attached in a home port, and for a debt for which the other owners are not personally liable, the managing owner cannot bind them by procuring a third person to become surety on a bond given to release the attachment: *Mitchell v. Chambers*, 43 Mich. 150, 38 Am. Rep. 167. Where, however, the owners are all personally liable for the debt or obligation on which the attachment issues, and his co-owners are beyond reach, the managing owner has authority to bind them by procuring bail: *Backer v. Highley*, 15 Com. B., N. S., 27, 32 L. J. Com. P. 270, 10 Jur., N. S., 391, 9 L. T. 228, 11

Week. Rep. 968. Where a vessel is chartered by the majority owner, and is attached while abroad for a personal debt of such owner, on an action by the master against all the owners for delay and loss of employment caused by their failure to release the vessel, it was held to be the duty of the owners to replevy the vessel. If the majority owner did not, the minority owners should, and all might, therefore, be held liable: *Swift v. Tatner*, 89 Ga. 660, 32 Am. St. Rep. 101, 15 S. E. 842.

One part owner cannot replevy his undivided share in a vessel held by a sheriff on attachment process. "The decisive objection to the maintenance of the action is that it calls for the delivery of a fractional part of a chattel to the plaintiff, which delivery cannot be made without delivering to him the whole chattel in which others have rights of ownership. The command of the writ cannot be obeyed without assuming control of property other than that which is the subject matter of the suit and the title to which cannot properly be put in issue, and tried in this suit": *Hackett v. Potter*, 131 Mass. 50. A sheriff on an execution against some only of several part owners can sell only their interests, although one of their number may have held a power of attorney to sell the share of the other owners: *Hopkins v. Forsyth*, 14 Pa. St. 34, 53 Am. Dec. 513. In Louisiana part owners engaged in carrying property for hire are regarded as commercial partners, and if one of them be a resident of the state, although the others are not, a partnership creditor cannot attach the vessel, the attachment law being treated as applicable only to the property of nonresident debtors: *Shirley v. Steamer Bride*, 5 La. Ann. 260.

SALLEY v. ROBINSON.

[96 Me. 474, 52 Atl. 930.]

FIXTURES—License to Erect Structure.—If a structure is placed upon the land of another, to be used by the builder during the pleasure of the land owner, the ownership of the structure remains in the builder with a right to remove it when the license is revoked. This is true, though part of the structure is under ground, and does not become a part of the realty as a fixture, unless, after reasonable notice to remove it, it is suffered to remain, and then it may be treated as abandoned by the builder. (pp. 411, 412.)

FIXTURES—Pipe Line—Liability for Cutting and Appropriating.—If a pipe line is placed upon the land of another under a license to be used by the builder during the pleasure of the land owner, the ownership of the pipe line remains in the builder until the license is revoked, and if the land owner, without notice to the builder, or request to remove, cuts the pipe, depriving the builder of his supply of water, and takes the whole flow to himself, through the agency of the pipe line, he is liable therefor to the builder of the pipe line. (pp. 411, 412.)

E. F. Danforth, S. W. Gould, and A. K. Butler, for the plaintiff.

E. N. Merrill, for the defendant.

478 STROUT, J. In the summer or fall of 1877, Mr. Sayward, a former owner of the premises now owned by the plaintiff, built a dam upon land of the defendant, where there were springs of water, and laid underground an iron pipe through defendant's land and the public street to his premises. The water from the spring was forced through the pipe by a hydraulic ram located at or near the dam, over which Sayward erected a structure, called the ram-house. From that time until the pipe was cut by the defendant, in November, 1900, Sayward and his successors in title, including the plaintiff, received water for domestic use upon the premises now owned by the plaintiff. The plaintiff claimed an easement by prescription to take the water in this manner. This was denied by the defendant, who claimed that the dam, water-pipe and ram were placed there by Sayward by license of defendant, without consideration, to be used by Sayward until the defendant wanted to use the water for something else, and that Sayward never claimed the right to draw water from that spring any longer than defendant saw fit to give it to him. Sayward remained the owner or occupant of the premises supplied with water by this pipe until June 21, 1899. Defendant claimed the right to revoke the license. Under this claim he cut the pipe and stopped the flow of water to plaintiff, and connected the pipe with his own premises, and received there the whole flow from the spring through the plant built and established by Sayward.

If we assume that the defendant's contention is correct, and that he had the right, at his pleasure, to revoke the license and stop the flow of water to plaintiff's premises, what were the legal rights of the parties, in relation to the ram and pipe as affected by the act of the defendant? The license to Sayward to lay his pipe and draw water by the same implied authority to him, in case the defendant revoked the license, to go upon the premises and remove the ram and pipe. A structure placed upon land of another to be used by the builder during the pleasure of the owner of the land, the ownership of the structure by the builder and his right to **479** remove it when the land owner revokes his license, is recognized and im-

plied. The principle is the same if, as in this case, a part of the plant is underground. Such plant does not become a part of the realty, as a fixture, unless, after reasonable notice to remove it, it is suffered to remain, in which case it may be treated as abandoned by the owner.

Here the defendant, without notice to the plaintiff or request to remove, cut his pipe. While he had the right, upon defendant's contention, to stop the flow of water by any means not destructive to the pipe, he had no right to injure or destroy that. But he did more; he not only cut the plaintiff's pipe and stopped his water, but he connected the pipe with his own premises, and drew water therefor through the plaintiff's pipe by means of plaintiff's ram, thus appropriating to himself the plaintiff's plant, to the exclusion of the plaintiff.

When Sayward put down the pipe, he put a tee in it near defendant's premises, for the purpose of allowing defendant to take water therefrom if he chose. This he never did until he cut the pipe. If he had connected with the pipe at the tee, and allowed the water also to go on to plaintiff, the plaintiff could not complain. But to cut off plaintiff's supply and take the whole flow to himself, by the agency of plaintiff's pipe and ram, was an injury for which the defendant is responsible.

It is expressly conceded by the learned counsel for the defense that if there is any liability of defendant, the damages are not excessive.

Motion overruled.

In the case of *Peaks v. Hutchinson*, 96 Me. 530, 53 Atl. 38, it was held that a building does not become part of the realty when erected on the land of a wife by her husband under an agreement that it shall be the personal property of the builder; nor does such building pass by a conveyance of the land to a bona fide purchaser without notice, although from its character, purpose, and mode of use, it appears to be a part of the realty. The court said:

"If it be assumed, however, that the plaintiff was a bona fide purchaser for value without notice, his contention that the stable passed to him as a part of the realty is not supported by the rule of law which has hitherto prevailed in this state in this class of cases. *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254; *Hilborne v. Brown*, 12 Me. 162, and *Tapley v. Smith*, 18 Me. 12, established the principle that a building erected by one man on the land of another, by his permission, remains the personal property of him who erects it and does not pass by a conveyance of the land to a third person, although from its character, purpose and mode of use, it appears to

be a part of the realty, and the conveyance is to a bona fide purchaser without notice. These decisions have never been overruled in this state, although it must be admitted that they have been somewhat discredited by the comments of our own court in more recent decisions, and the rule established by them is undoubtedly contrary to the great weight of authority relating to this question. In *Fifield v. Maine Cent. R. R. Co.*, 62 Me. 77, the court say: 'The case of *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254, and subsequent cases, establish the doctrine here that bona fide purchasers, who even without notice acquire title to land, are not entitled to claim such structures as a house, store or mill standing on the land at the time of purchase, if such buildings were at such time the property of a third person, although from their situation upon the land they had the appearance of being a part of the realty. The case of *Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254, does not accord with the adjudged cases in Massachusetts and New Hampshire in this respect, and the general course of decisions is rather opposed to it: See enumeration of cases compared in the extensive notes to the case of *Elwes v. Mawe*, 2 Smith's Lead. Cas. 99' (9th ed., p. 1423).

"Again, in *Dustin v. Crosby*, 75 Me. 75, the court say: '*Russell v. Richards*, 10 Me. 429, 25 Am. Dec. 254, is not an opposing authority. That case was decided upon the ground of estoppel, and even that case has been a good deal criticised by other courts. Certainly its doctrine is not to be extended.'

"With respect to the effect of such an agreement as against third persons, the American and English Encyclopedia of Law says: 'The weight of authority is to the effect that a subsequent purchaser or mortgagee of the land without notice of the agreement is not affected thereby. But in Alabama, Maine and New York the rule appears to be otherwise, and a subsequent purchaser or mortgagee cannot claim the chattels, though ignorant of the agreement by which they were to retain their personal character': 13 Am. & Eng. Ency. of Law, 628, tit. 'Fixtures.' And the numerous authorities there cited appear to warrant the statements in the text: See, also, *Fuller-Warren Co. v. Harter*, 110 Wis. 80, 84 Am. St. Rep. 867, 85 N. W. 698, and elaborate note, pp. 877-901.

"In view of the general policy of our law to constitute the registry of deeds the true source of information respecting titles to real estate, it may seem that the Maine rule has no stronger support in equity than in authority, since under its operation an innocent purchaser of land may find encumbrances upon it against which no ordinary care or vigilance on his part would afford any safeguard or protection. But if it be deemed more reasonable and just that such an agreement should not be effectual against any person except the original parties thereto and those having actual notice thereof, unless it is in writing and recorded in the registry of deeds, the legislature can appropriately so declare."

Fixtures Annexed by Licensee.—Where one erects a building or annexes any fixture to real property by permission of the owner, with the understanding that it may be removed at the pleasure of the builder, it does not become a part of the realty, but continues to be a chattel and the property of the licensee. It has been held that this is true of gas-pipes laid at the request of the owner of property: See the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 882, 883.

SWIFT v. WINCHESTER.

[96 Me. 480, 52 Atl. 1017.]

INSOLVENCY—**Effect of Discharge in.**—A discharge in insolvency is void as against nonresident creditors who have not made themselves voluntary and consenting parties to the proceedings, by proving their claims, accepting dividends, or otherwise. (p. 414.)

INSOLVENCY—**Effect of Discharge in on Nonresident.**—If a nonresident does business in the state under a firm name which does not disclose his identity nor his residence, and which leads a debtor to believe that he is dealing with a resident, the discharge of the debtor in insolvency is not a bar to the claim of such nonresident creditor who does not participate in the insolvency proceedings. (p. 415.)

INSOLVENCY.—**The Effect of a Discharge** in insolvency depends upon the authority of the court granting it, and not upon the conduct of the parties. (p. 415.)

INSOLVENCY.—**Discharge in Insolvency** is void as against nonresident creditors, because the insolvency court has no jurisdiction over them. (p. 415.)

B. C. Additon and D. W. Nason, for the plaintiffs.

D. D. Stewart, for the defendant.

⁴⁸¹ SAVAGE, J. The plaintiffs, who are nonresidents, bring this action to recover the price of meats sold to the defendant in Bangor. In defense, the defendant sets up a discharge from his debts under the insolvent laws of this state.

It is a well-settled and familiar rule of law, which needs only to be stated, that a discharge in insolvency is void as against nonresident creditors who have not made themselves voluntary and consenting parties to the proceeding, by proving their claims, accepting dividends, or otherwise: *Felch v. Bugbee*, 48 Me. 9, 77 Am. Dec. 203; *Hills v. Carlton*, 74 Me. 156; *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, 24 Atl. 795; *Silverman v. Lessor*, 88 Me. 599, 30 Atl. 526; *Baldwin v. Hale*, 1 Wall. 233. It is admitted that the plaintiffs in this case

did not in any manner participate in the insolvency proceedings of the defendant. But it appears that the plaintiffs at the time the meats in question ⁴⁸² were sold were doing business in Bangor, under the name of the Bangor Beef Co.; that their general manager was a citizen of Bangor; that the sign upon the plaintiff's store was "Bangor Beef Co."; that all of the transactions of the plaintiffs were done solely under that name; and that their individual names nowhere appeared. It is admitted that until the commencement of this suit the defendant had no knowledge that the plaintiffs had any interest in, or connection with, the store of the "Bangor Beef Co.," or the property in it, but supposed that he was trading with an incorporated company.

Upon these facts the learned counsel for the defendant urges that the manner in which the plaintiffs conducted their business was fraudulent as to the defendant, that it was a suppression of the truth, and that thereby the defendant was falsely entrapped into trading with them. It is claimed that had the defendant known the truth he would or might have refused to trade with the plaintiffs, incurring debts which would not be barred by a discharge in insolvency, and that by means of the alleged fraudulent conduct of the plaintiffs he has been put into a false position and thereby injured. And it is argued that the plaintiffs, having thus induced the defendant to believe that he was trading with a citizen of the state, should be treated as such citizens are, and that their claim should be barred by his discharge in insolvency.

We do not, however, think the defendant's premises are sound in fact. The plaintiffs had a right to do business under the name of the Bangor Beef Co. if they chose to do so, and the case does not show that they in any manner transcended their legal rights. But were it otherwise, the result claimed by the learned counsel would not follow.

The effect of a decree of discharge in insolvency, in this respect, depends upon the authority of the court which granted it, and not upon the conduct of the parties. As was said by the court in *Pullen v. Hillman*, 84 Me. 129, 30 Am. St. Rep. 340, 24 Atl. 795, the question "is one of jurisdiction." The cases in the supreme court of the United States seem to establish the doctrine that the true ground upon which such a discharge is void as against nonresident creditors is that the insolvency court has no jurisdiction over them. In *Gilman v. Lockwood*, 4 Wall. 409, it is ⁴⁸³ said: "Insolvent laws of one state cannot

discharge the contracts of citizens of other states, because such laws have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction of the cause." In *Denny v. Bennett*, 128 U. S. 491, 9 Sup. Ct. Rep. 137, Miller, J., said: "Whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to relieve him from the obligation of a contract which he owes to a resident of another state, who is not personally subject to the jurisdiction of the court": See, also, *Hammond Beef etc. Co. v. Best*, 91 Me. 431, 40 Atl. 338; *Murphy v. Manning*, 134 Mass. 488; *Murray v. Roberts*, 150 Mass. 353, 15 Am. St. Rep. 209, 23 N. E. 208, 6 L. R. A. 346, and note; *Cook v. Moffat*, 5 How. 309. If a nonresident creditor voluntarily participates in the insolvency proceedings of his debtor, he subjects himself to the jurisdiction of the court and is bound by its decrees. But if he stands aloof, he remains independent of the jurisdiction of the court, and his right of action upon a contract with his debtor is not thereby impaired, no matter what his conduct may have been. These plaintiffs resided beyond the jurisdiction of the insolvency court which decreed a discharge to the defendant. There was no power in that court to reach them. It had no jurisdiction over them. Its decree could not deprive them of their right of action. Hence, the discharge of the defendant in insolvency is not a defense to this action.

The case of *French v. Robinson*, 86 Me. 142, 41 Am. St. Rep. 533, 29 Atl. 960, cited and relied upon by the defendant, is not like the one at bar. There the nonresident owners of a note assigned it to a citizen of this state for a nominal consideration, in order that he might sue upon it in his own name in this state. The assignee recovered judgment, and in a suit on that judgment a plea of discharge in insolvency was interposed. The court held that the plaintiff was the legal owner of the judgment, while the original assignors were equitable owners only, and that because the legal owner was a resident of the state the discharge was a defense. It was declared that "the insolvency court deals with the legal owners of ⁴⁸⁴ demands ordinarily." The doctrine of the opinion in that case is not applicable in this one. There the legal creditor was a resident; here the creditors were nonresidents. There the legal creditor was subject to the jurisdiction of the insolvency court;

here the creditors were not. The defense fails. The amount of the debt sued has been fixed by the stipulation of the parties.

Judgment for plaintiffs for one hundred and ninety-seven dollars and twenty-four cents and interest from the date of the writ.

Insolvency—Nonresidents.—The effect of insolvency proceedings on nonresident creditors is discussed in the monographic note to *Murray v. Roberts*, 15 Am. St. Rep. 212-221. See, too, *Bank Commrs. v. Granite State etc. Assn.*, 70 N. H. 557, 85 Am. St. Rep. 646, 49 Atl. 124; *Adams v. Batchelder*, 173 Mass. 258, 73 Am. St. Rep. 282, 53 N. E. 824; *French v. Robinson*, 86 Me. 142, 41 Am. St. Rep. 533, 29 Atl. 960. A discharge in insolvency by the courts of one state is of no effect against a creditor of another state who has not submitted himself to the jurisdiction of such courts. But if he comes in and proves his claim, and takes a dividend on it, or if he accepts a sum offered under composition proceedings, he is held to have waived his right of objection: *Chase v. Henry*, 166 Mass. 577, 55 Am. St. Rep. 423, 44 N. E. 988; *Pattee v. Paige*, 163 Mass. 352, 47 Am. St. Rep. 459, 40 N. E. 108.

COTE v. CITY OF BIDDEFORD.

[96 Me. 491, 52 Atl. 1019.]

OFFICE—Abandonment of and Waiver of Right to Salary.—

An officer who has abandoned and relinquished his office and its emoluments by acquiescing in his removal therefrom for years, though not admitting the legality of such removal, and by failing during all that time to make any formal demand for the office or its compensation, or to object to the performance of official duties, or drawing salary by his successor, or to institute proceedings to test the title to the office or the right to remove him, while he engages in other occupations, is not entitled to recover the salary of the office. (pp. 418, 419.)

OFFICE—Waiver of Right to Salary—Illegal Removal.—

An officer who has abandoned and relinquished his office and its emoluments, by acquiescing in his removal, and failing for years to make any pretense of being the incumbent of the office, or entitled to its salary, thereby waives his right to such salary, although his removal from the office was illegal and void. (pp. 418-420.)

E. Foster, G. F. and L. Haley, and R. B. Seidel, for the plaintiff.

N. and H. B. Cleaves, C. S. Perry, F. W. Hovey, city solicitor, B. F. Cleaves, H. T. Waterhouse, and G. L. Emery, for the defendant.

⁴⁹² WISWELL, C. J. On March 27, 1893, the plaintiff was duly elected city marshal of the city of Biddeford for the
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municipal years of 1893 and 1894 by the city council of that city, and upon the same day he qualified by taking the oath of office. On the next day an act of the legislature providing for the establishment of a board of police of the city of Biddeford, chapter 625, of the Special Laws of 1893, went into effect. This police board was given authority by the act "to appoint, establish and organize the police force of said city, including the marshal and deputy marshal, and to remove the same for cause and make all the needful rules and regulations for its government, control and efficiency." It was provided by the act that the members of the police force in office when the member of the board of police were first appointed should continue to hold their offices until removed by the board.

This police board organized just prior to July 1, 1893, and upon that day entered upon the performance of the duties for which it was established. One of its first acts was to attempt to remove the ⁴⁹³ plaintiff from the office of city marshal and to elect one Charles B. Harmon as his successor in that office without making any charges against the plaintiff, or assigning any cause for his removal or giving him any notice of their proposed action. Two days later, on July 3d, the board gave notice to the plaintiff of his removal and of the election of his successor.

Nearly seven years later, on March 22, 1900, the plaintiff, claiming that the action of the police board in attempting to remove him from office was ineffectual, and that he had continued to hold the office of city marshal from the time of his election in 1893 up to the date of his writ in 1900, commenced this action to recover the salary of the office from January 24, 1899, to the date of his writ. The reason why the account sued did not commence back of the date named being undoubtedly that on January 23, 1899, the plaintiff filed his voluntary petition in bankruptcy. At nisi prius the trial resulted in a verdict for the plaintiff for the amount claimed, and the case comes here upon the defendant's motion for a new trial.

It is undoubtedly true that the action of the police board in attempting to remove the plaintiff and to elect a successor in the office was unauthorized and void. The plaintiff had been elected to the office just prior to the time when the act creating the board of police went into effect and he could only be removed for cause: *Andrews v. Police Board of Biddeford*, 94 Me. 68, 46 Atl. 801. But it does not by any means follow from the fact that the plaintiff was city marshal in 1893, and

that the attempt to remove him from that office on July 1st of that year was ineffectual, that he continued to hold the office for the period embraced in his account sued, and during all the intervening years.

In fact, notwithstanding the verdict of the jury in his favor, we are entirely satisfied from all of the circumstances of the case, and especially from the plaintiff's conduct for years prior to the commencement of the account sued, that long before that time he had voluntarily relinquished and abandoned the office and all claims to its emoluments; that although he did not admit the legality of his removal or the power of the board to make a removal in that way, he, for years before the commencement of the account sued, had ⁴⁹⁴ acquiesced in the result of the action of the police board, and had made no pretense to be longer an incumbent of the office or entitled to the salary attached thereto.

It would not be profitable to here make an analysis of the testimony or to refer at any considerable length to the facts which force us to this conclusion. It is sufficient to refer to the following as some of the salient features of the case. From the time that notice was given to the plaintiff of his removal from office, he never performed or attempted to perform any of the duties of the office. He engaged in other occupations during all of the years that intervened between the attempted removal and the commencement of this suit. He never made any claim or demand for compensation, thus allowing the earlier part of his claim therefor to be barred by the statute of limitations. He made no objection or protest to a performance of the duties of office by the person appointed as his successor nor to his regularly drawing the salary attached to the office. When, on January 23, 1899, he filed his petition in bankruptcy, he did not include in the schedule of his assets any indebtedness due him from the city of Biddeford, although, if the position now taken by him is true, the city at that time was indebted to him for salary to an amount of over three thousand dollars, too large a sum to be inadvertently omitted; the attempted explanation of this omission is unsatisfactory.

But stronger than all of these circumstances is the fact, we think, that from July, 1893, until the commencement of this action on March 23, 1900, he never commenced any legal proceedings of any kind to test the title to his office or the legality of the action of the police board. It is true that at first he thought of commencing proceedings for the purpose of ascer-

taining his rights and employed counsel with this purpose in view, but such proceedings were never commenced, and within a comparatively short time all idea of commencing them was abandoned.

A portion of the language of the opinion of the court in the case of *Phillips v. Boston*, 150 Mass. 491, 23 N. E. 202, very similar to this, is so applicable that we quote therefrom: "If, having it in his power to reinstate himself, or be reinstated by proper proceedings, in an office from which he has been wrongfully but actually removed, ⁴⁹⁵ and he makes no effort to that end, but submits for a long term of years to the removal, the inference is inevitable that he waives his right thereto during that period." Again: "If his removal was unlawful, it was in his power to bring up the proceedings of the board by petition for certiorari, by which its action could have been quashed and the petitioner afterward restored by a mandamus to his public office. It was his duty to initiate this promptly, and not to wait and seek, after ten years of apparent acquiescence, to maintain that during all this time he was of right entitled to a public office in which he made no effort to be reinstated, and the duties of which he did not attempt to perform. It was especially the duty of the plaintiff to seek to be reinstated in his office by formal demand, and, if necessary, by appropriate legal proceedings, in view of the peculiar relation in which he stood to the defendant, of which he now seeks to avail himself." The court going on to explain that the plaintiff, as the plaintiff in this case, had no contractual relation with the defendant city, but was a state officer appointed to preserve its peace and to execute its laws as well as the ordinances of the city.

It is impossible for us to believe that this plaintiff, who for nearly seven years remained in apparent acquiescence with the result of the action of the police board, who saw another perform the duties of the office and regularly draw its salary, without objection or protest on his part, who made no demand during all of this time for the salary attached to his office of two dollars per day, until the earlier portion of it even became barred by the statute of limitations, who omitted an indebtedness of over three thousand dollars, if his position is true, from his bankruptcy schedule, and who never commenced legal proceedings of any kind during all of these years, claimed during all of this period to be an incumbent of the office and to be entitled to its emoluments. Upon the other hand, we are forced to the conclusion that the position now taken by him is

the result of an afterthought, attributable, perhaps, to the announcement, on February 17, 1900, one month about before the commencement of this suit, of the decision in the case of *Andrews v. Police Board of Biddeford* 496 94 Me. 68, 46 Atl. 801, where a similar action of that police board was held by this court to have been illegal.

In coming to this conclusion we do not forget the fact that the case has already been submitted to a jury and that the trial resulted in a verdict in the plaintiff's favor; nor do we fail to give the plaintiff the full benefit of that verdict in the consideration of the question as to whether or not a new trial should be granted. But the conclusion reached by us seems so inevitable and irresistible that we are satisfied that the verdict was wrong and should be set aside.

Motion sustained. New trial granted.

An Office may be Vacated by abandonment, and, when so vacated it cannot be refilled by an accidental, voluntary, or forcible reoccupancy by the former holder: *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367. An office may become vacant by absence of the incumbent from the state: *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310, 35 Pac. 163.

An Officer Wrongfully Removed or suspended may recover his salary during the period of removal or suspension: *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280, 10 Atl. 458; *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198, 30 Pac. 1113.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE BANK OF EAGLE GROVE v. DOUGHERTY.

[167 Mo. 1, 66 S. W. 932.]

HOMESTEADS—Extraterritorial Effect of Statutes.—The right of homestead is purely a creature of statute. Such statutes can have no extraterritorial force, and must be construed to apply to homesteads solely within the state of the enactment of the statute. (p. 423.)

HOMESTEADS—Extraterritorial Effect of Statute.—A statute referring to the acquiring of one homestead with the proceeds of the sale of another refers exclusively to homesteads within the state of the enactment of the statute. (p. 424.)

HOMESTEADS—Acquisition by Sale of Homestead in Another State.—A homestead acquired in one state with the proceeds of a sale of a homestead, in another is subject to the payment of debts accruing prior to the filing for record of the deed to the homestead last acquired. (pp. 422, 424.)

Thurman & Wray, for the appellant.

H. W. Timmonds, for the respondents.

⁴ BRACE, P. J. On November 6, 1895, the defendant, A. H. Dougherty, became indebted to the plaintiff bank on a ⁵ promissory note on which the bank obtained judgment against him in the Barton circuit court for the sum of two hundred and seventy-three dollars and thirty cents at the January term of said court, 1898. At the time this indebtedness was incurred the said defendant owned three hundred and twenty acres of land in Iowa on which he resided with his family, and which he afterward sold, and invested two thousand dollars of the proceeds thereof in the eighty acre tract in Bar-

ton county described in the petition, his deed for which was filed for record on March 7, 1896, about which time he moved with his family on said eighty acre tract and has ever since occupied the same as a homestead. Afterward, on August 25, 1897, he conveyed the same by deed to his codefendant, Napper, who on the same day by deed conveyed the same to the defendant, Mary N. Dougherty, wife of the said A. H. Dougherty. These deeds were duly executed, acknowledged and recorded, but were without consideration, and this suit is brought to set them aside and subject the land to the payment of plaintiff's judgment. On the facts the judgment was for the defendant and the plaintiff appeals.

The only question in the case is, Is the Barton county homestead exempt from execution on plaintiff's judgment by reason of the fact that it was bought with the proceeds of land in Iowa, in which the defendant Dougherty under the laws of that state had a homestead? The plaintiff's cause of action having accrued before the said defendant acquired the Barton county homestead, and before his deed therefor was filed for record, it was subject to execution upon the judgment (Rev. Stats. 1899, sec. 3622), unless exempted therefrom by the provisions of section 3622 of the Revised Statutes of 1899, by which it is provided that, "whenever such housekeeper or head of a family shall acquire another homestead in the manner provided in section 3622, the prior homestead shall thereupon be liable for his debts, but such other homestead shall not be liable for causes of action against him to which such prior homestead would not have been liable; provided, that such other homestead shall ⁶ have been acquired with the consideration derived from the sale or other disposition of such prior homestead."

The right of homestead is purely a creature of statute, and while such a right has been created by statute in all or most of the states, such statutes can have no extraterritorial force, and must be construed to apply to homesteads within the state of the enactment. The section quoted is a part of the chapter entitled "Homesteads," by which such right is created in this state. The legislature, in section 3623, is dealing with homesteads in Missouri, two of them, a prior and a subsequent one, acquired in accordance with the provision of that act. The prior homestead which is to become subject to the housekeeper's debts is a homestead in Missouri and the subsequent one acquired with the consideration derived from

the sale of the prior one, is a homestead in Missouri, which is not to be liable for debts to which the prior homestead in Missouri would not have been liable. With a prior homestead in Iowa or any other state this statute has nothing to do. Of course the legislature never attempted to subject a prior homestead in Iowa, or any other state to a housekeeper's debts, or intended to make the liability of a subsequent homestead in Missouri depend upon the liability of a prior homestead in another state. Upon no principle of statutory construction or interstate comity, so eloquently invoked by counsel for respondent, could the homestead laws of Iowa have that effect, as is well illustrated by the decisions of the supreme court of that state.

In *Rogers v. Raisor*, 60 Iowa, 356, 14 N. W. 317, the opinion is as follows:

"DAY, J. Our statute provides that the owner of a homestead may change it entirely, and that the new homestead, to the extent in value of the old, shall be exempt from execution in all cases where the old or former homestead would have been exempt: Code, secs. 2000, 2001. Under ⁷ these sections it has been held that a new homestead, acquired with the proceeds from the sale of the old one, is exempt from judicial sale in all cases in which the former homestead would have been exempt: *Sargent v. Chubbuck*, 19 Iowa, 37; *Thompson v. Rogers*, 51 Iowa, 333, 1 N. W. 681; *Pearson v. Minturn*, 18 Iowa, 36. The laws of Missouri are not pleaded, and will, for the purpose of this case, be presumed to be the same as our own. The laws of each state, however, apply only to homesteads acquired and held under its own laws and within its territorial jurisdiction. The laws of neither state can have any extra-territorial force or application. What, then, was the character impressed upon the proceeds of the Iowa homestead when taken to Missouri for reinvestment?

"The laws of Iowa ceased to operate upon it and to affect its character as soon as it was invested in real estate in the state of Missouri. It was not the proceeds of the sale of a homestead held under the laws of Missouri, for these laws can apply only to a homestead held under the law of that state. It follows that the fund arising from the sale of the Iowa homestead, upon being carried into Missouri, lost the distinctive character of being the proceeds of the sale of a homestead.

"When these proceeds were invested in a homestead in Missouri, that homestead was not exempt from execution for the debt in question, which existed before the homestead was ac-

quired: Code, sec. 1992. For like reason the new homestead acquired in Lineville, in 1873, was liable for debts contracted before it was purchased. The court did not err in sustaining the demurrer. Affirmed."

In the subsequent case of *Dalton v. Webb*, 83 Iowa, 478, 32 Am. St. Rep. 314, 50 N. W. 58, the ruling in *Rogers v. Raisor* was reiterated and affirmed. So that the shadow of an argument on the score of comity, in support of respondent's contention disappears under the rulings of the state in whose behalf it is invoked. Nor do we find any support for that contention in either of the two cases⁸ relied upon: *Stinde v. Behrens*, 81 Mo. 254; *Keyes v. Rhines*, 37 Vt. 260, 86 Am. Dec. 707. In the former case it was in effect held that the conveyance by the wife of her interest in a homestead in Kansas was a good consideration for the conveyance to her in her own right of real estate in Missouri, and that the latter conveyance was not in fraud of a creditor from whose debt the homestead was exempt. In that case, as is said in the opinion: "The exchange of deeds was made at the homestead of the defendants, and while it was being occupied by them as such, and was consented to by Mrs. Behrens upon the express condition that the property to be received in consideration for the conveyance of her homestead should be conveyed to her. . . . And it has been held by the supreme court of Kansas that the conveyance by the wife of her interest in the homestead is a sufficient consideration for the transfer to her, in her own right, of the proceeds of such conveyance"; and this court sustained Mrs. Behrens' title, not because of any protection extended to it by the homestead laws of Kansas, but because it was her property acquired by a valid contract under the laws of that state where the contract was made.

The Vermont case is of like character. There "the defendant's wife signed a deed of their homestead, sold under process of law in New Hampshire, upon condition of the payment of the proceeds to her, to be kept by her as a separate fund for a future investment in a homestead, free from all interference of her husband," and the court held that "she thereby acquired title to the money, and held it free from attachment on her husband's debts."

The judgment for the defendants on the facts is manifestly erroneous, and is reversed, and the cause remanded with directions to the circuit court to enter a decree in favor of the plaintiff in accordance with the prayer of the petition.

All concur.

Homesteads.—*The Exemption of the Proceeds* from the sale of homesteads is considered in the note to *Morgan v. Roundtree*, 45 Am. St. Rep. 237-239; *Locke v. Post*, 71 Vt. 343, 76 Am. St. Rep. 778, 46 Atl. 226; *Schuttloffel v. Collins*, 98 Iowa, 576, 60 Am. St. Rep. 216, 67 N. W. 397; *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448. When the proceeds of the sale of a homestead in one state are invested in a homestead in another, and the latter homestead is sold and the proceeds invested in another homestead in the former state, the last homestead is not exempt, but is liable for the debts of the homestead claimant incurred in that state prior to the last investment: *Dalton v. Webb*, 83 Iowa, 478, 32 Am. St. Rep. 314, 50 N. W. 58.

STATE v. MISSOURI GUARANTEE SAVINGS AND BUILDING ASSOCIATION.

[167 Mo. 489, 67 S. W. 215.]

CONSTITUTIONAL LAW—**Building and Loan Associations—Insolvency.**—A statute making it a felony for any officer of any mutual savings fund, loan and building association, to receive, or assent to the reception of any money or other valuable thing in payment of any premium, dues or fees due or owing to such association, after knowledge of the fact that it is insolvent or in failing circumstances, and making the failure of such association prima facie knowledge of its insolvency, is constitutional. Such statute does not impair the obligation of contracts in denying stockholders in such association, who became borrowers prior to the passage of the statute, the right to pay their premiums, nor does it deprive them of property without due process of law. (p. 428.)

CONSTITUTIONAL LAW.—Criminal statutes leveled against acts that would be frauds without such criminal enactments, and intended for the protection of the rights of citizens, cannot have the effect of impairing the obligation of contracts or of depriving any person of his property without due process of law. (p. 429.)

M. Jourdan, for the appellants.

H. K. and H. J. West, for the respondent.

491 MARSHALL, J. This is a proceeding by mandamus to compel the defendants Hayward and Verity, respectively the president and secretary of the defendant association, to receive from the plaintiff, a borrowing stockholder, the sum of thirty-nine dollars. "on account of dues, interest and premiums legally due to the association on a valid contract."

The petition alleges, inter alia: "6. That said association is insolvent and in failing circumstances, but that notwithstanding that fact it is still the desire of relator and such other borrowing stockholders to pay to the association and its officers

the amounts so due to it from relator, and such other stockholders, respectively; 7. That by reason of the refusal ⁴⁹² of the defendant association and the defendant officers to receive the amount so due from relator, and the amounts so due from other persons legally indebted to the association, the assets and property of the association are being wasted and squandered, and that such refusal, if continued, will result in wasting and squandering the assets and property of the association, to the pecuniary injury of the relator; 8. That for such pecuniary injury so threatened relator has no remedy by action at law; 9. That the sole reason and ground upon which the defendant association and its officers refuse to receive and collect the moneys due to the association is, that as the association is insolvent and in failing circumstances, to receive said moneys would subject its officers and all persons who might receive said moneys for the association to prosecution and punishment under the provisions of an act of the fortieth general assembly of the state of Missouri, entitled 'An act to prohibit the receipt of premiums, fees and dues by officers of mutual saving fund, loan and building associations, when the same are in an insolvent condition, and providing a punishment therefor'; 10. That said act affords no reason or excuse for such refusal, for the reason that said act is unconstitutional and void, in that said act is in violation of section 10 of article 1 of the constitution of the United States; and in that said act is in violation of section 15 of article 2 of the constitution of the state of Missouri; and in that said act is in violation of the fifth amendment of the constitution of the United States; and in that said act is in violation of section 30 of article 2 of the constitution of the state of Missouri." The prayer of the petition is that the said officers be compelled to receive said sum.

An alternative writ was issued. The defendants demurred. The circuit court overruled the demurrer. The defendants stood upon the demurrer, the circuit court made the writ peremptory, and defendants appealed.

⁴⁹³ 1. The only point presented for adjudication in this case is the constitutionality of the act of May 17, 1899: Laws 1899, p. 121. That act makes it a felony for any officer of any mutual saving fund, loan and building association to receive or assent to the reception of any money or other valuable thing in payment of any premium, dues or fees due or owing to said association, after knowledge of the fact that the association is

insolvent or in failing circumstances, and makes the failure of such association *prima facie* knowledge of insolvency or of such failing circumstances.

The position of the plaintiff is that this act violates section 10, article 1 of the federal constitution, which prohibits any state to pass any law impairing the obligation of contracts, and that it violates section 15, article 2 of the state constitution, which prohibits the passage of any law impairing the obligation of contracts; and also violates the fifth amendment to the constitution of the United States, and section 30 of article 2 of the state constitution, which provide that no person shall be deprived of life, liberty, or property without due process of law.

The application of these constitutional guaranties to the case at bar is, that the plaintiff became a borrowing stockholder before the passage of the act of 1899, and that such act impairs the obligation of his contract to pay his premiums, dues and interest under his contract and deprives him of his property without due process of law, because it punishes any officer of the association as for a felony, if he receives dues, etc., after the association becomes insolvent, etc., and the unprecedented and hitherto incomprehensible condition is presented of a stockholder demanding to pay dues to an association which he admits is insolvent. This is the converse of the cases that have heretofore reached this court, for all the prior cases have been proceedings against the officers of financial ⁴⁹⁴ associations for receiving money after the association was insolvent: *State v. Sattley*, 131 Mo. 464, 33 S. W. 41; *State v. Darrah*, 152 Mo. 522, 54 S. W. 226.

In the cases cited a similar act relating to officers of banks receiving money after the bank was insolvent was held to be constitutional, and in the first case cited the sentence of the defendant to a term in the penitentiary was affirmed. It is true that in those cases the law in reference to bank officers was challenged as unconstitutional, on the ground that it denied the officers of banks the equal protection of the law, guaranteed by the federal constitution, because officers of trust companies were not embraced in the law, whereas in this case the constitutional guaranty invoked is against the passage of any law impairing the obligation of contracts, and prohibiting the taking of life, liberty or property without due process of law.

The act in question places officers of building and savings associations in the same boat with officers of banks, so far as receiving money after the association becomes insolvent is concerned. The principle underlying both laws is the same. The purpose of both laws is to protect the people who pay money into such associations. Instead of such laws impairing the obligation of a contract or depriving persons of their property without due process of law, they do not in the slightest degree affect the contract, and do conserve the property of the citizen by preventing officers from receiving it when the association is insolvent, and in this way they save the money that would be lost to the citizen if received by such associations.

The cases cited by plaintiff interpreting the provisions of the federal and state constitutions in reference to impairing the obligation of contracts and taking property without due process of law, undoubtedly state the law correctly, but they have no application to the case at bar. For if the association is solvent or insolvent, if the officers are punished criminally or not, if the dues are paid to the ⁴⁹⁵ officers or to a receiver of the association, the obligation of the contract will not be impaired, and the plaintiff's money will not have been taken from him without due process of law.

It is too plain to admit of discussion that criminal statutes leveled against acts that would be frauds without such criminal enactments, and intended for the protection of the rights of the citizen, cannot have the effect of impairing the obligation of contracts or of depriving any man of his property without due process of law.

Amplification is superfluous. The petition stated no cause of action. The act of 1899 is constitutional. The judgment of the circuit court is erroneous, and it is reversed.

All concur, except Valliant, J., absent.

Crime.—*The Power of the Legislature* to pronounce acts criminal is considered in *Gillespie v. People*, 188 Ill. 176, 80 Am. St. Rep. 176, 58 N. E. 1007; *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68; monographic note to *Booth v. People*, 78 Am. St. Rep. 235-274. See page 249 of this note for cases upholding statutes making it a crime to receive a bank deposit, when the bank is known to be insolvent.

STATE v. WASHBURN.

[167 Mo. 680, 67 S. W. 592.]

CONSTITUTIONAL LAW—Office—Power of Appointment.—

A statute giving power to a partisan political committee to name certain persons from whom the governor must name an election commissioner, is in effect conferring on such committee the power of appointment and is unconstitutional as an infringement on the power of the executive department of the state. (p. 432.)

CONSTITUTIONAL LAW—Appointment to Office—Special Law.—A statute conferring on the central committee of one political party only the power to name certain persons from whom the governor must appoint an election commissioner violates a constitutional prohibition against passing any local or special law granting to any "corporation, association or individual any special or exclusive right, privilege or immunity." Such statute confers a special privilege on the committee of one political party, and withholds it from the committee of all other parties. (pp. 432 435.)

OFFICE.—Election Commissioners are state officers, and exercise powers properly belonging to the executive department of the state government, and must trace their right to office to that department. (p. 435.)

CONSTITUTIONAL LAW—Appointment to Office.—The legislature may pass a statute prescribing the manner in which an appointment to an executive office shall be made, but it cannot make the appointment itself, nor authorize anyone not connected with the executive department to make it. It cannot rob the executive of the power of appointment to office by conferring it on an outside unofficial agency of its own appointment. (p. 436.)

OFFICE.—Appointment to a Governmental Office is, in itself, the exercise of a governmental function, and can be exercised only by a government officer, and not by the legislature. (p. 436.)

CONSTITUTIONAL LAW—Appointment to Office.—A statute creating an office and naming by description the men who are to fill it is in effect creating the office and appointing the officer, or making the law and executing it, and is unconstitutional as an unlawful attempt to exercise a governmental function. (p. 436.)

CONSTITUTIONAL LAW—Appointment to Office—Right of. A statute giving power to a partisan political central committee to name certain persons from whom the governor must name an election commissioner is void as an unwarranted encroachment on the governor's constitutional power of appointment to office. In such case the governor's choice is not confined to the persons named by the party committee, but he may choose any other eligible person and appoint him to such office. (p. 438.)

CONSTITUTIONAL LAW—Statute Invalid in Part.—If the part of a statute which is unconstitutional does not enter into the life of the act, and is not essential to its being, it may be disregarded and the rest remain in force. (p. 439.)

Clark & Francisco, E. E. Yates, and W. M. Williams, for the appellant.

J. H. Lucas and Gage, Ladd & Small, for the respondent.

⁶⁸⁶ VALLIANT, J. This is an appeal from a judgment of the circuit court of Bates county ousting the appellant from office as member of the board of election commissioners of Kansas City, in a proceeding in the nature of quo warranto upon the information of the prosecuting attorney of Jackson county. The suit was begun in the circuit court of Jackson county, and taken by change of venue to Bates county.

The facts in the case are undisputed. An act was passed by the general assembly and approved June 19, 1899, amending the then existing statute in relation to the board of election commissioners in cities having over one hundred thousand inhabitants, one ⁶⁸⁷ part of which amendatory act is in these words: "There is hereby created a board of election commissioners for each city that is governed by the provisions of this act, composed of three members, who shall be appointed as follows: Within ten days after this act takes effect, the governor shall appoint three election commissioners, one of whom shall be by him designated as the chairman of the board, and one of whom shall be by him designated as the secretary of the board, which said three election commissioners shall hold their offices for the term of three years, and until their successors are appointed and qualified. . . . One of said election commissioners so appointed by the governor shall be a member of the leading party politically opposed to that to which the chairman and the secretary so appointed belong and shall be chosen from three eligible citizens named by the city central committee of the said leading party politically opposed to that to which the chairman and secretary belong": Laws 1899, p. 197.

As in performance of the duty imposed upon him by that act, the governor appointed three election commissioners for Kansas City, one of whom he designated as president and another as secretary of the board, and the third, who is the member at whom this writ is leveled, was of the leading party opposed politically to that to which the two others belonged. He possessed all the qualifications that were required to render him personally eligible to the office, and immediately upon his appointment qualified and entered upon its duties and was discharging the same when, by this proceeding, he was called into court to show by what authority he was so acting. His right to hold the office and discharge its duties is challenged upon one ground only—that is, that he was not nominated by the city central committee of his party. That committee, as contemplated by the act of 1899, duly named three eligible citi-

zens from whom the choice was to be made. This appellant was not one of the three, but was appointed by the governor ⁶⁸⁸ of his own free choice in disregard of the nominations of that committee. The question for decision therefore is, Did the governor have the lawful authority to appoint to the office one, otherwise eligible, who was not of the three thus nominated?

1. This brings into question the validity, under the constitution, of the act of 1899 above mentioned, or so much thereof as essays to confer the power of nomination on the party committee. Appellant maintains that that portion of the act is in violation of section 53 of article 4 of the constitution which is: "The general assembly shall not pass any local or special law granting to any corporation, association or individual any special or exclusive right, privilege or immunity."

The purpose of that clause in our constitution is to secure to everyone within the state that equality in right, privilege and immunity, conferred by law, which is an absolute essential to our form of government. It is not to be confused with the idea that it was designed to prevent such inequality in fact in the conditions of individuals as their own acts may bring about it, but it means that such inequality shall not be created by law, that the state shall deal even-handed with all. The same idea runs through the constitutions of other states and is expressed in forms more or less explicit, but in our constitution it is comprehensive and clear in its meaning. Is that purpose violated by the statute in question which seeks to confer upon the committee of one political party the right to appoint an officer to exercise a governmental function in the matter of state elections when the same right is not given to any other partisan committee?

Although the power here attempted to be conferred is not literally the power of appointment, yet its effect is the same — it leads to the appointment, and if the legislature has the authority to confer the power to nominate, in the manner indicated, it has the authority to confer the power to appoint without the circumlocution, which is merely formal. If the governor ⁶⁸⁹ may be compelled to select one of three, he may be limited in his preference of one of two, and, either in form or in skillful practice, there might be no choice left to the executive at all. We must consider the statute, therefore, as conferring on the partisan committee the power to name the officer, for such is the effect.

The clause of our constitution above quoted does not prohibit the general assembly passing a statute to affect particularly one class. Since there are classes of individuals and corporations so essentially different from other classes as that a law designed to apply to all would apply to some in one way and to others in another, or to some in one degree and to others in a larger degree, it becomes absolutely necessary that laws should be made to affect particular classes, else the very inequality sought to be avoided would be produced. A law might be uniform in theory, yet in its operation produce unjust discrimination, discriminating in effect by failing to discriminate in form, that is, by failing in shape to fit the unequal conditions to which it must apply. Therefore, a law is not within the constitutional inhibition because it is designed to operate on one class only, provided the conditions reasonably justify the distinguishing of the class, and provided it affects equally all who come within that class: *Hamman v. Central Coal etc. Co.*, 156 Mo. 232, 56 S. W. 1091. But if the attempted classification be arbitrary, or if the statute essays to confer a "right, privilege or immunity" upon one or some in the class and not upon all, the act is invalid: *State v. Walsh*, 136 Mo. 400, 37 S. W. 1112; *State v. Thomas*, 138 Mo. 95, 39 S. W. 481. Does this act of 1899 recognize the existence of a class by natural conditions and does it affect all in that class alike?

The legislature certainly had in view the fact that there were great political parties in the state and that the management of the affairs of those parties was in the hands of their respective party committees. That is a natural and reasonable ⁶⁹⁰ classification, and legislation to affect that class is not forbidden by the constitution. Laws to govern the administration of the affairs of political parties have been enacted and their validity has not been questioned. But if, for example, an act should be passed by the legislature to govern primary elections, and should provide that the county central committee of that party by name which happened to have the majority in the general assembly should have the privilege of appointing the judges and clerks of their primary elections, but that the governor should appoint those of the next largest party and the county court should appoint those of other parties. what would be thought of such a law, not merely of its policy or fairness, but of its validity under the constitution?

It is said, however, that here the party whose committee

is given the right to appoint the officer is not designated by name and that any party is liable to fill the description; that it may apply to one party in one city and at the same time to another in another city; to one party in this city to-day and to another party in the same city next year. But whilst that is true, the fact is that when and where the law does take effect, it confers a right on the committee of one party and withholds it from committees of all other parties. The fact that it may operate to the advantage of one party in one place or at one time and to that of another party in another place or at another time, is of no consequence; the vice is that when it does operate it discriminates in favor of one party, it confers an important right under the state government to one of a class and withholds it from the rest. That is exactly what the constitution forbids.

It is argued that the theory of the statute is that the governor will protect the interests of his own party, but that the interest of the next largest political party should be intrusted only to its own party committee. That argument doubtless had its weight in the general assembly, where alone it is appropriate, but courts have nothing to do with the policy of a statute; they deal only with the question of its validity when it is assailed. The general assembly is not always composed of men of two political parties only, and if there were representatives in that general assembly belonging to a third party, they might have questioned even the policy of the law which excluded all members of their party from a share in its administration.

2. There is another constitutional standpoint from which this case should be viewed, and from which the act of 1899 in question is equally indefensible. By article 3 it is ordained as follows: "The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted."

All governmental powers are in their natures either legislative, executive or judicial. The constitution does not undertake to define what acts fall within the one class or the other, but leaves every act to be classified according to its nature, recognizing that the essentials which distinguish those that be-

long to one department from those that belong to the two others are discernible to the learned mind. But in that article of the constitution all the powers of the state government are disposed of, and everyone who lawfully exercises any state governmental function is able to trace the source of his authority to one of the three departments there named. The power, whatever its character, can be exercised only by or under authority of the separate magistracy to which by the constitution it is assigned.

The election commissioner is an officer who exercises an important function of the state government, affecting not alone the city in which his duties are performed, but the ⁶⁹² whole state. He fills, therefore, in its full sense, the definition of a public officer. He is not a state officer within the narrow meaning of that term as used in section 12, article 6, which confers jurisdiction on this court in cases in which a state officer is a party, but he is an officer of the state in the sense that a sheriff or a circuit clerk is an officer of the state: *State v. Dillon*, 90 Mo. 229, 2 S. W. 417; *State v. Bus*, 135 Mo. 325, 36 S. W. 636; *State v. Higgins*, 144 Mo. 410, 46 S. W. 423. A public officer exercising a function of the state government is an agent or servant of the sovereign people of the state, and must derive his authority either by election by the people or appointment by that tribune to whom the people have confided the power of appointment. It is therefore necessary that he should trace his title to the office to the department of the state government to which, under article 3 above quoted, the power to confer title to such an office is committed.

But suppose, when called into court to show by what authority he holds the office, he shows that he has been appointed by the city central committee of his political party, to what department of the state government would we charge the appointment? It may be said, however, that the committee is not to make the appointment; it is to be made by the governor. If the governor of his own free will makes the appointment, even if he selects one of the three nominated by the committee, it is his appointment and the appointee may truly say that he holds by appointment under the executive department. But we are concerned now with the question of the power of the legislature to compel the governor to make the appointment from one of the three named by the committee, and we are asked to say that the governor, by force of this act, cannot do otherwise than register the will of the committee.

If that is the law, then, in reality, what would be the source of an appointment under it?

We are referred to section 9 of article 14 of the constitution, ⁶⁹³ which is: "The appointment of all officers not otherwise directed by this constitution shall be made in such manner as may be prescribed by law." And it is contended that that section confers authority on the general assembly for this act. That section expressly authorizes the general assembly, acting within its legislative capacity, to pass a law prescribing the manner in which an appointment shall be made, but it does not authorize the general assembly to make the appointment itself nor to authorize anyone unconnected with the government to do so. To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature legislative, the other is essentially executive. The constitution authorizes the legislature to do the one, but not the other.

Article 3, above quoted, confides the exercise of executive functions to a separate magistracy. When the general assembly undertook in this act of 1899 to confer upon the city central committee of a political party the power to appoint to an important office in the state government, did it intend thereby to elevate that committee into the executive department of the state government and make it a part of that separate magistracy to which administrative functions of the government were intrusted?

If the general assembly had essayed to appoint the third election commissioner itself, the act of appointment would clearly have been void, because it would have been an attempt to exercise executive power. Since the legislature cannot appropriate to itself a power that the constitution has conferred on the executive, can it rob the executive of that power by conferring it on an outside unofficial agency of its own appointment?

The act of appointing to a governmental office is in itself the exercise of a governmental function, and can be exercised only by a governmental officer. Therefore, when the power to make such appointment is conferred on a hitherto unofficial ⁶⁹⁴ person, if the act conferring the power is valid, the person on whom it is so conferred becomes ipso facto a public officer: *Meehan on Public Officers*, sec. 11. Assuming, then, for the sake of the argument, without so deciding, that the legislature had the power under section 9 of article 14 to create an office

to exercise the function of appointing the third member of the board of election commissioners, still it had no right to appoint the person or persons who should fill the office so created.

The constitution of Ohio contains a clause very similar to section 9, article 14 of our constitution above quoted. In that state the legislature passed a law creating a board of commissioners to do certain public service, and in the act named three individuals and authorized them to appoint the members of the board of commissioners. The question of the **validity of the appointments made by these three persons** came before the supreme court of that state, and it was held that the act of the legislature in that particular was unconstitutional; that whilst the constitution gave the legislature the power to create the office of board of commissioners and prescribe by law the manner of appointment, it did not give it the power to make the appointment, and that the naming of the three individuals and conferring on them the power to make the appointment was, in itself, the creation of another office **and the appointment by the legislature to that office: State v. Kennon**, 7 Ohio St. 546. The same view of the subject has been taken by the supreme court of North Carolina: **State v. Stanley**, 66 N. C. 59, 8 Am. Rep. 488; **State v. Tate**, 68 N. C. 546. There was a clause in the constitution of each of those states expressly denying the legislature the power to appoint to office, but whilst our constitution does not in express terms say that the general assembly shall not exercise the power of appointment to office, it does expressly say that it shall not exercise a power properly belonging to either of the other departments, and that is as ⁶⁹⁵ explicit as if it had specified that it should not make appointments or render judgments.

When, therefore, the general assembly undertook to confer the power to appoint the third election commissioner of Kansas City on a body of men not officially connected with the state government, it undertook in effect to create an office to exercise the governmental function of filing by appointment another public office, and not only to create such office but to name by description the men who were to fill it, in effect creating the office and appointing the incumbents, making the law and executing it. Section 9, article 14 gives no such power, and article 3 forbids it.

We are referred to *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218, which it is claimed sustains a similar act of the general assem-

bly. But there is a wide difference between that case and this. The act of the legislature in the Lucas case required the governor to appoint a board of examiners to pass on the fitness of persons to be licensed to conduct the business of barbers in cities having over fifty thousand inhabitants, and to make his appointments on the nominations of the barbers' unions in the cities affected. That act of the legislature treated all barbers' unions as a class, and did not confer "a right, privilege or immunity" upon one union that it did not confer on all in the class. It did not appear in that case that there was more than one union in each city. Therefore, the act did not fall within the limits of section 53, article 4, as discussed in the first paragraph of this opinion. Besides, in that case, there was no suggestion that the governor in fact did not appoint those persons nominated by the barbers' unions; therefore, the question of his authority to ignore those nominations, and appoint whomsoever his judgment dictated, was not in the case. Any citizen has the right to recommend to the governor a person for appointment; not only individuals but political committees and trade unions do in fact make such nominations, and if the governor sees fit to appoint one so nominated, the appointment is as much the ⁶⁹⁶ free act of the executive as if he had been unaided by the outside suggestion. But acting in accordance with recommendations is one thing, while yielding to dictation is another. That idea is clearly expressed in the Lucas case by Marshall, J., who delivered the opinion of the court: "If the act is unconstitutional because it limits the governor's privileges of appointment to persons recommended by the unions specified, the governor alone could object. If he does not do so no one else can complain. That no such trouble has arisen under this act is shown by the fact that it appears that in fact the governor has appointed a board of examiners—whether they were recommended by such unions or whether the governor treated that provision of the act as unconstitutional and appointed such persons as he chose does not appear—and that this prosecution is at the instance of that board." We say nothing now that is in conflict with anything that was decided in that case.

The act of filling a public office by appointment is essentially an administrative or executive act, and, under the constitution, can be exercised only by an officer charged with the duty of executing the laws. There is, however, an exception to this rule which does not conflict with the meaning of article

3. Courts and the general assembly may appoint such officers or agencies as are necessary to the exercise of their own functions. This power is essential as a right of self-preservation, and is necessary to preserve that very independence in the several departments of the government, which article 3 is designed to guard: Mechem on Public Officers, secs. 104, 105.

There are other reasons urged by appellant in defense of his title to the office in question, but as we are satisfied upon the grounds above stated that so much of the act of 1899 in question as attempts to limit the power of the governor in making the appointment to a choice of persons nominated by the city central committee of a political party is an unwarranted ⁶⁹⁷ encroachment on the governor's constitutional powers, it is unnecessary to consider the other questions.

The point is advanced that if the act of 1899 is unconstitutional in the particular named, the whole act is void and the incumbent has no title to the office. The power attempted to be conferred on the partisan committee is not an essential element in the whole act. Where the part of an act that is unconstitutional does not enter into the life of the act itself, and is not essential to its being, it may be disregarded and the rest remain in force; that is this case.

The record shows a perfect title in appellant to the office in question, and, therefore, the judgment of the circuit court is reversed.

All concur, except Sherwood and Robinson, JJ., who dissent.

The Power of Appointment to Office is considered in the monographic note to *People v. Freeman*, 13 Am. St. Rep. 125-147. The power to appoint or elect to office does not necessarily belong to either the legislative, executive or judicial departments of the government. It is commonly exercised by the people, but the legislature may, as the law-making power, provide for its exercise by either department, or by any person or association of persons which it may choose to designate: *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98, 13 South. 416; *State v. George*, 22 Or. 142, 29 Am. St. Rep. 586, 29 Pac. 356; *Sinking Fund Commrs. v. George*, 104 Ky. 260, 84 Am. St. Rep. 454, 47 S. W. 779; *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 59 N. E. 468; *Renaud v. State Court etc.*, 124 Mich. 648, 83 Am. St. Rep. 346, 83 N. W. 620. But see *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174, 22 South. 721.

Who are Public Officers is considered in the monographic note to *State v. Hocker*, 63 Am. St. Rep. 181-193.

MARKS & HAAS JEANS CLOTHING CO. v. WATSON.

[168 Mo. 133, 67 S. W. 391.]

APPEAL.—The Test of the Jurisdiction on Appeal in a case praying for an injunction is the value in money of the relief prayed for by the plaintiff. (p. 445.)

PLEADING.—Waiver of Objections to Petition.—The objections to a petition that the court has no jurisdiction over the subject matter, and that the petition does not state facts sufficient to constitute a cause of action, cannot be waived. (p. 446.)

CONSTITUTIONAL LAW.—The Absolute Right of the Freedom of Speech and the Press cannot coexist with the idea of preventing such freedom of speech or of the press by injunction. (p. 446.)

STATUTORY CONSTRUCTION.—Exceptions strengthen the force of a general law, and enumeration weakens, as to things not enumerated. (p. 447.)

CONSTITUTIONAL LAW.—Free Speech is Essential to the Existence of Personal Liberty under a constitutional provision guaranteeing personal liberty. (p. 448.)

INJUNCTION AND FREE SPEECH.—Wherever the Authority of Injunction Begins, there the Right of Free Speech, free writing, or free publication ends. (p. 450.)

CONSTITUTIONAL LAW.—The Absolute Right of Free Speech, Free Writing, and Free Publication guaranteed by the constitution can neither be impaired by the legislature, nor hampered nor denied by the courts. (p. 450.)

INJUNCTION.—Free Speech.—Poverty.—Under a constitutional provision giving every person the right to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty, an injunction cannot be granted against one exercising such right on the ground that he has no property. (p. 450.)

EQUITY.—The Fact that there is no Remedy at Law does not necessarily and of itself give a court of equity jurisdiction to afford relief. (p. 450.)

BOYCOTT.—Equity Cannot Enjoin a Peaceable Boycott of employers by a labor union, where there is no intimidation through fear of personal violence, or of the destruction of property, nothing but the mere abstaining from business relations with them and the persuasion of others to do likewise. (p. 451.)

Walter D. Coles and Silas B. Jones, for the appellant.

William B. Thompson, Francis A. Thornton, and Lee Meriwether, for the respondents.

¹³⁷ SHERWOOD, J. The plaintiff company sought to enjoin defendants from declaring or enforcing a boycott against it to the injury of its business, by inducing its customers, and others who might become such, from dealing with it for its productions. To carry through the boycott (as it is termed)

into effect, the following circular was issued and freely circulated by defendants:

"Headquarters of Joint Executive Board of L. A. 993, Knights of Labor, Local Union 129, United Garment Workers of America, Affiliated with the American Federation of Labor, St. Louis, Mo., April, 1898.

"A few reasons why a boycott has been placed against the firm of Marx & Haas, manufacturers of jeans clothing and the Jack Rabbit pants, St. Louis, Mo.:

"This trouble between the clothing cutters of St. Louis and the firm of Marx & Haas originated as far back as September, 1895, when the clothing cutters were all in one labor organization, namely, the Knights of Labor, which trouble at that time culminated in a boycott being placed against the firm by the Knights of Labor. The firm, in order to counteract the boycott, which was doing their business a great deal of injury, evolved a scheme which they knew would have the desired effect, if carried out successfully. This was nothing less than the organization of a rival union, and so, by threats of discharge for noncompliance with their demands, promises of increase in wages, steady work all the year around, and the ¹³⁸ payment of all expenses, they finally induced the men employed in their shops to organize a local union of the United Garment Workers of America. Now, let us see how well they kept their promises.

"In the spring of 1896, instead of the steady work which they had promised, they laid the men off from three to six months, and in December of the same year, after keeping the men idle for this length of time, and knowing they were practically forced to accept whatever terms they might dictate, they reduced their wages from ten to fifteen per cent, and increased the amount of work required. In May, 1897, they again reduced the men's wages from twenty-five to thirty-five per cent. This last reduction brought the men to a realization of their helpless condition, and so they made overtures to the Knights of Labor for a union of forces, which was finally effected, and while the two organizations maintain their separate unions, they work in harmony on all trade matters, and have the hearty approval of the general officers for their action. Immediately after the reunion a schedule of work and wages was submitted to the firm, and after considerable trouble it was accepted by the firm, but was in force but a short time when the firm again violated its signed and sealed contract; the

organization decided to let the matter rest until the expiration of their contract, which took place on January 1, 1898. Immediately after the above date we presented another schedule of work and wages, which the firm could not misconstrue, as they had done with former schedule. After waiting for several weeks for a decision from the firm, which was withheld on one pretense or another, the organization finally decided to inform the firm that the schedule submitted by the organization would go into effect on and after Tuesday, March 23, 1898; for answer to this the firm presented a schedule to the committee who waited on them, which was so outrageously high that no man could do the work were he ever so willing. The committee were also informed by Mr. H. Marx, the president ¹³⁹ of the firm, that 'any g——d d——n man who would not work according to his schedule would be kicked out of his shop, and he would let the whole business go to h——l before he would work by any g——d d——n schedule but his own!' The committee made a verbatim report of their visit to the firm to the joint organization, who immediately rejected the firm's schedule, and issued instructions to the men employed by the firm to work according to their own schedule from the date set by the organization. For carrying out the laws of the organization four of the men were discharged, the first two being officers of the organization, the firm thinking that if they got rid of the agitators, as they called them, the rest of the men would continue to submit to the inhuman treatment they had been receiving for the past three years.

"You will see from the above statement of facts what an unscrupulous firm this is; we are positive we have proven to you the justice of our position, and we hope it will not be necessary to inform the labor and reform organizations with which we are affiliated who are in your locality as we are satisfied we have convinced you that the stand we have taken in this case is a just one, and will command the support of all fair-minded men. We therefore request you to write to Messrs. Marx & Haas and inform them that you would request them to settle the dispute with their employes, or otherwise you cannot afford to handle their goods as long as they are antagonizing organized labor, who are your friends and customers; by doing this you will aid us in getting simple justice from this more than unfair firm. Should this firm make a settlement with us you will be informed of the fact under the seals of the joint organizations. Until such time we trust there will be

no report made to our office that Marx & Haas have shipped you any more goods.

"Kindly inform us what action you take in this matter; and any further information you may desire will be cheerfully¹⁴⁰ furnished by writing to Headquarters of Joint Executive Board, No. 911 Pine street, St. Louis, Missouri.

"[Seal]

[Seal]"

Supplemental to this circular, committees were appointed to wait upon various merchants in St. Louis and vicinity and inform them of the trouble existing between the Marx & Haas company and its employés, and request their assistance in the cause of the employés, by refusing to deal further with Marx & Haas during the pendency of the trouble. In some instances, as appeared in the evidence at the trial, threats were made by members of these committees that the patronage of the boycotters and their friends would be withheld from certain merchants unless they discontinued their business dealings with the plaintiff corporation; but in no instance were there threats made of any resort to violence or unlawful intimidation. The threats were always and solely threats of a mere withholding of trade relations by the boycotters and those acting with them; no intimidation through fear of personal violence, or of the destruction of property; nothing but the mere abstaining from business relations with them and the persuasion of others to do likewise.

The plaintiffs' petition concludes with the prayer: "That the defendants, their associates, confederates, agents and representatives be enjoined and restrained by a temporary order of injunction, to be made final upon the hearing of this cause, from boycotting or making effectual, promulgating or in any wise proclaiming any boycott upon or against the plaintiff or its goods, and from sending, conveying or delivering in any way, to any person, firm, corporation or association, any boycott notice, verbal or otherwise, referring to the plaintiff or its goods, and from in any way menacing, hindering or obstructing the plaintiff from the fullest enjoyment of all the patronage, business and custom which it may possess, enjoy or¹⁴¹ acquire, independent of the action of the said defendants or any of them."

The answer of Brining was a general denial. The answer of the other defendants is a general denial, and contains other defenses.

The point of difference, it seems from the answer, which gave origin to this litigation, consisted in the difference in the schedules either party insisted on, respecting the number of double layers of cloth that would have to be cut by one operation of the machine and also sectionized with the knife; plaintiff insisting on a larger number being thus cut with the machine and sectionized with the knife; defendants on a less number.

After setting out the varying number of layers of different kinds of cloth required to be cut by the old schedule and the new, and showing the excess of thickness under the latter, the answer proceeds: "This means double layers of cloth—or from forty-eight to one hundred and twenty layers of cloth according to material, to be cut at one operation of the new machine. The machine is fixed at one end of a table forty-five feet long and the cloth stretched in layers one hundred and twenty in number, the length of the table making eighteen hundred yards on the table when sixty pairs are cut. This cloth weighs about one-third of a pound to the yard, or six hundred pounds in the eighteen hundred yards. It being impracticable to draw such a weight to the new machine, which is fixed, and to manipulate it so as to make the band-saw of the machine follow the outlines of the garment to be cut, it is necessary to section it with a knife by hand, cutting through one hundred and twenty thicknesses of cloth—about five and one-half to six inches—at one operation, a labor of great difficulty, and ruinous to the hand, when continued any length of time, and this plaintiff insisted its employes should do, without offering one cent of additional compensation for the greatly increased labor and severity to the hand. Even with the lighter schedule of January 17, 1898, the labor is great, and ¹⁴² injury to the hand is severe, causing painful bruises and carbuncles.

"With the new machine and greatly increased number of layers of cloth required by plaintiff, not only is the labor more than double without any increase of compensation, but the injury to the employe's hand is so great as would, in a few weeks, disable and compel him to cease from such labor. Plaintiff sought to obtain all the benefit of increased production without any increased compensation to the employe—utterly regardless of the increased severity of the labor extorted from him, and the pain and suffering inflicted, and without any benefits to the public by reduction in prices, which it hypocritically claims, and invokes the powers of the court to enable

it to maintain and enforce its oppressive and heartless exactions.

"Defendants say there was and is no objection to the use of said machine under a reasonable schedule, but those of defendants employed as cutters did refuse, for the reasons above stated, to work under the excessive, unconscionable, and unreasonable schedule proposed by plaintiff on March 16, 1898, and for this were discharged by plaintiff in terms of the vilest abuse."

The answer then denies any confederation or conspiracy to coerce or intimidate the customers of plaintiff from doing business with plaintiff.

Defendants then "say that they have, as they are advised they have a perfect right to do, made and published a truthful statement of their grievances against plaintiff, and endeavored to persuade plaintiff's customers and others, not to buy any goods from plaintiff, till plaintiff righted the wrong it had done to defendants—acts of repeated bad faith and oppression going back as far as 1895."

The testimony of H. N. Marx supports the theory that the sectionizing to be done with the knife was much more severe on the hands, owing to the increased number of thicknesses ¹⁴³ of cloth, when done under the new schedule plaintiff insisted on, than when done under the old schedule under which defendants had been working. And the witness virtually, though evasively, admitted that their employes complained to him that their hands would be ruined if required to work under the new schedule. Defendants introduced no evidence. At the close of the testimony the lower court dissolved the temporary injunction previously granted, and entered a decree dismissing plaintiff's petition—hence this appeal.

1. Some question seems to have been raised in division one of this court, whether jurisdiction of this cause belonged to this court, and the matter is mentioned in plaintiff's supplemental brief.

The allegation is made in the petition and verified by affidavit that if defendants be not restrained, as prayed, plaintiff will be damaged in excess of ten thousand dollars. This is sufficient to show jurisdiction in this court. The test is the value in money of the relief afforded plaintiff should the relief prayed for be granted, or vice versa, should the relief be denied: *Evens & Howard Fire Brick Co. v. St. Louis Smelting*

etc. Co., 48 Mo. App. 634; Gast Bank Note etc. Co. v. Finnimore Assn., 147 Mo. 557, 49 S. W. 511.

2. The next point for consideration is the sufficiency of the petition to authorize the granting of injunctive relief when viewed from a constitutional standpoint. Our statute (Rev. Stats. 1899, sec. 602) provides that two objections to a petition cannot be waived—one that “the court has no jurisdiction over the subject matter of the action”; the other, “that the petition does not state facts sufficient to constitute a cause of action.” Such a defect is radically erroneous and incurable even though not raised in the court below: *Weil v. Greene Co.*, 69 Mo. 281, and cases cited, and many subsequent cases.

Section 14 of our Bill of Rights declares that “no law shall be passed impairing the freedom of speech; that every ¹⁴⁴ person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty.” The evident idea of that section is penalty or punishment, and not prevention. Because, if prevention exists, then no opportunity can possibly arise for one becoming responsible by saying, writing, or publishing “whatever he will on any subject.” The two ideas, the one of absolute freedom “to say, write or publish whatever he will on any subject,” coupled with responsibility therefor, and the other idea of preventing any such free speech, free writing or free publication cannot coexist. And just here it must be observed that the right of free speech, free writing or free publication were not created by the constitution, which recognizes those rights as now existing, and only seeks their protection and perpetuation: *Cooley’s Constitutional Limitations*, 6th ed., 511 et seq. That instrument simply forbids any law to be passed impairing the freedom of speech, and then gives a general and perpetual guaranty against any interference from any quarter whatever, with the freedom of every person “to say, write or publish whatever he will on any subject.” Language could not be broader, nor prohibition nor protection more amply comprehensive.

Wherever within our borders speech is uttered, writing done, or publication made, there stands the constitutional guaranty giving staunch assurance that each and every one of them shall be free. The legislature cannot pass a law which even impairs the freedom of speech; and as there are no exceptions contained in the rest of the quoted section, the language there used stands as an affirmative prescription against any exception being thereto made, as effectually as if words of negation or prohibition had expressly and in terms been employed.

As Denio, C. J., aptly says: "But the affirmative prescriptions, and the general arrangements of the constitution, are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose ¹⁴⁵ of that provision": *People v. Draper*, 15 N. Y. 544.

And Thompson, C. J., touching the same point, observes: "The expression of one thing in the constitution is necessarily the exclusion of things not expressed. This I regard as especially true of constitutional provisions, declaratory in their nature. The remark of Lord Bacon, 'that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things not enumerated,' expresses a principle of common law applicable to the constitution, which is always to be understood in its plain, untechnical sense: *Commonwealth v. Clark*, 7 Watts & S. 127": *Page v. Allen*, 58 Pa. St. 338, 98 Am. Dec. 272.

Besides, section 14, aforesaid, is, as before stated, part and parcel of the Bill of Rights, and Judge Cooley, when speaking of that portion of a constitution which bears such designation, says: "It is also sometimes expressly declared—what indeed is implied without the declaration—that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void. . . . While they continue in force they are to remain absolute and unchangeable rules of action and decision": *Cooley's Constitutional Limitations*, 6th ed., 48.

The rights then set forth and designated in section 14 are "excepted out of the general powers of the government; all laws contrary thereto are void, and so long as such provisions of the Bill of Rights continue in force they remain absolute and unchangeable rules of action and decision." And, as the learned author and eminent jurist just quoted says in another place with great force: "The securities of individual right . . . cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachment of power, nor to watch with too lively a suspicion the propensity of persons in authority to break through the 'cob-web chains of paper constitutions'": 2 *Story on Constitution*, Cooley's ed., sec. 1938.

¹⁴⁶ Nor is it to be forgotten that the right of free speech is also impliedly guaranteed in another section of the Bill of Rights, section 30, to wit: "That no person shall be deprived of life, liberty or property without due process of law." In

other words, free speech is as an inevitable concomitant and adjuvant of personal liberty, as necessary to the latter's existence as vital air to the lungs, or locomotion to the body. Speaking of section 30, this court, on a former occasion, has said: "The rights thus guaranteed are something more than the mere privileges of locomotion; the guaranty is the negation of arbitrary power in every form which results in the deprivation of a right. These terms, 'life,' 'liberty' and 'property' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law": *State v. Julow*, 129 Mo. 172, 173, 50 Am. St. Rep. 443, 31 S. W. 781.

The probable reason why the rights of free speech, free writing and free publication were mentioned in terms in our organic law is that in the mother country from whence our institutions were derived, there was scant regard paid to those rights in that country, and a censorship existed over the press, and publication without permission was punished as criminal; and various annoying restrictions over free speech existed; and men were punished by imprisonment for offensive words spoken in debate, even in parliament.

In California the provisions of the constitution on the point in hand are similar to our own, thus: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of ¹⁴⁷ the press": Const., art. 1, sec. 9. And in that state this cause arose: One Durrant was upon trial in the city of San Francisco, charged with murder, and while the jury were being impaneled the petitioner, Dailey, advertised by posters and newspapers that he would produce in a certain theater in said city a play entitled: "The Crime of a Century." Durrant presented an affidavit to the court wherein his trial was then pending setting forth that said play was based upon the facts of his case and would deprive him of a fair and impartial trial, etc. The court made an order directing Dailey to desist. On review by the supreme court this was held to be an infringement of the constitutional right freely to speak and write:

Dailey v. Superior Court, 112 Cal. 94, 53 Am. St. Rep. 160, 44 Pac. 458. And the order made was annulled on certiorari, the ruling being based on the constitutional provisions above quoted. Garoutte, J., who delivered the opinion of the court in bank, in the course of it observed: "The wording of this section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. It is patent that this right to speak, write and publish cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose": Cited in 6 Am. & Eng. Ency. of Law, 2d ed., 1003.

A similar case arose in this state, that of Life Association of America v. Boogher, 3 Mo. App. 173, where the plaintiff sought to enjoin the publication of a libel. The lower court on demurrer held that the petition stated no ground for relief, and this judgment was affirmed in the court of appeals, ¹⁴⁸ Gantt, P. J., observing: "Enough is stated to inform us that defendant has uttered a malicious, false, scandalous and libelous statement respecting the plaintiff, and that with the purpose of inflicting injury on the plaintiff, defendant proposes and threatens to repeat and enlarge the wrong and injury already inflicted; that the resulting loss to the plaintiff will be great, and irreparable by civil action, because of the insolvency of the defendant; and thereupon the aid of a court of justice is claimed, to prevent that for which, if perfected, it cannot give compensation. It is obvious that, if this remedy be given on the ground of the insolvency of the defendant, the freedom to speak and write, which is secured by the constitution of Missouri to all its citizens, will be enjoyed by a man able to respond in damages to a civil action, and denied to one who has no property liable to an execution. . . . In Missouri, where we are expressly forbidden by the constitution to assume the power we are asked by the plaintiff to exercise, our answer cannot be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared 'that every person may freely speak, write, or print on any

subject, being responsible for the abuse of that liberty.' If it be said that the right to speak, write, or print, thus secured to everyone, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, our answer is that we have no power to suspend the right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. Courts of justice can only administer the laws of the state, and, of course, can do nothing by way of judicial sentence ¹⁴⁹ which the general assembly has no power to sanction. The matter is too plain for detailed illustration. The judgment of the circuit court is affirmed, all the judges concurring."

Section 14, *supra*, makes no distinction and authorizes no difference to be made by courts or legislatures between a proceeding set on foot to enjoin the publication of a libel, and one to enjoin the publication of any other sort or nature, however injurious it may be, or to prohibit the use of free speech or free writing on any subject whatever; because wherever the authority of injunction begins, there the right of free speech, free writing or free publication ends. No halfway house stands on the highway between absolute prevention and absolute freedom. The rights established by section 14 can neither be impaired by the legislature, nor hampered nor denied by the courts.

Nor does it in any way change the complexion of this case by reason of its being alleged in the petition "that the defendants and each of them is without means and has no property over and above the exemption allowed by law wherefrom the plaintiff might secure satisfaction for the damages resulting to it from the acts aforesaid." The constitution is no respecter of persons; the impecunious man "who hath not where to lay his head," has as good right to free speech, etc., as does the wealthiest man in the community. The right to enjoin in the former's case is precisely the same as in the latter's; no greater and no less. In short, the exercise of the right of free speech, etc., is as free from outside interference or restriction as if no civil recovery could be had or punishment inflicted because of its unwarranted exercise.

And in this connection, it is to be constantly borne in mind that the principle is firmly rooted in equity jurisprudence that though there be no remedy at law, this does not necessarily and of itself give a court of equity jurisdiction to afford relief. The authority to enjoin finds no better harbor in the empty pocket of a poor man than in the full pocket ¹⁵⁰ of the rich man. And such authority to enjoin can have no existence in circumstances such as the present case presents, if the constitution is to be obeyed.

If these defendants are not permitted to tell the story of their wrongs, or, if you please, their supposed wrongs, by word of mouth or with pen or print, and to endeavor to persuade others to aid them by all peaceable means, in securing redress of such wrongs, what becomes of free speech, and what of personal liberty? The fact that in exercising that freedom they thereby do plaintiff an actionable injury, such fact does not go a hair toward a diminution of their right of free speech, etc., for the exercise of which, if resulting in such injury, the constitution makes them expressly responsible. But such responsibility is utterly incompatible with authority in a court of equity to prevent such responsibility from occurring.

We do not, of course, pass upon questions not involved in this record, such, for instance, as the power of a court of equity to enjoin the destruction of property, or threats to do so; threats from which present ability to be carried into execution amount to verbal acts, nor threats of personal violence made with the view to intimidate, in its ordinary sense, employers or their employes; but we do hold that upholding, as we must, the constitutional provisions heretofore quoted, the defendants cannot be enjoined by a court of equity from exercising those rights of free speech, etc., guaranteed to them by the constitution of this state.

Holding these views, we affirm the decree of dismissal entered in favor of defendants by the court below.

Burgess, C. J., Brace, Marshall and Gantt, JJ., concur.

Robinson, J., dissents; Valliant, J., not sitting.

Boycott—Injunction.—A boycott is a combination of many to cause a loss to one person by coercing others against their will to withhold from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them. Unlawful boycotts include those that are threatening in their nature, and intended and naturally calculated to overcome, by fear of loss, the will of others: *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13; *Boutwell v. Marr*, 71 Vt. 1, 76 Am.

St. Rep. 746, 42 Atl. 607. An injunction against the circulation of false boycotting circulars intended to intimidate employes and customers of the complainant may be granted, although their publication as a libel would not be enjoined: *Beck v. Railway etc. Union*, 118 Mich. 497, 74 Am. St. Rep. 421, 77 N. W. 13. It may be said, in general, that an injunction is a proper remedy to stay the destructive ravages of a boycott, though the power to grant it should be exercised cautiously: *Longshore Print. Co. v. Howell*, 26 Or. 527, 46 Am. St. Rep. 640, 38 Pac. 547; *Murdock v. Walker*, 152 Pa. St. 595, 34 Am. St. Rep. 678, 25 Atl. 492. See, also, *Flaccus v. Smith*, 199 Pa. St. 128, 85 Am. St. Rep. 779, 48 Atl. 894. However, one man may lawfully refuse to deal with any man or class of men, and this right, which one may exercise singly, many may agree to exercise jointly: *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. 1119; *Macaulay v. Tierney*, 19 R. I. 255, 61 Am. St. Rep. 770, 33 Atl. 1.

AYRES v. KING.

[168 Mo. 244, 67 S. W. 558.]

PARTITION.—A Judgment Creditor Who, at a Sheriff's Sale, Purchases the Undivided Interest of his judgment debtor in land belonging to a decedent's estate, is not entitled to a partition of such land, where the judgment debtor owed the estate for more than his inherited share is worth, and is insolvent. (pp. 453, 454.)

ESTATES OF DECEDENTS.—The Indebtedness of a Legatee or Distributee to an estate constitute assets of the estate to be deducted from such legacy or distributive share. (p. 454.)

Tapley & Fitzgerald and I. C. Dempsey, for the appellant.

E. W. Major and J. D. Hostetter, for the respondent.

246 VALLIANT, J. Suit for partition of an interest in land owned by Joseph L. King, deceased, in his lifetime, who died intestate leaving as his heirs at law his brothers and sisters who are defendants, and a brother, James E. King. The plaintiff recovered a judgment for seven thousand nine hundred and four dollars and ninety-three cents against James E. King, and, shortly after the death of Joseph L. King, caused the undivided interest of James E., which he inherited from his brother Joseph, to be sold under execution on the judgment, and at such sale the plaintiff became the purchaser of that interest.

The answer of the defendants, the other brothers and sisters of Joseph, sets up two defenses: 1. That James E. King was indebted to his brother Joseph at the time of his death in the sum of three thousand dollars or more, which was more than his share in the estate was worth, and that he

was wholly insolvent; 2. That the estate of Joseph W. King was then in process of administration in the probate court, that claims to the amount of seven thousand dollars had been duly allowed against the estate by that court, that there was not sufficient personal property to pay the debts, and the land would probably have to be sold for that purpose, and that in pursuance to an order of the probate court the administrator had taken possession, and was then in possession of the land.

Upon the trial it was admitted that Joseph, at the time of his death owned an undivided one-fourth interest in the three hundred and twenty acres described in the petition. Plaintiff introduced in evidence his judgment against James E. King and the sheriff's deed under execution showing that at the sale plaintiff had purchased James' interest for four hundred and seventy-five dollars.

²⁴⁷ Defendants introduced evidence showing that A. A. King, one of the defendants, had been duly qualified as administrator of the estate, that administration was still pending, that claims to the amount of six thousand seven hundred and fifty-four dollars and thirty cents had been allowed against the estate; that the personal property was worth about six thousand dollars in notes to be collected; that whether there would be sufficient personalty to pay the debts was not then certain; that a proceeding was pending in the probate court to have the land sold to pay debts; that James E. King, whose interest the plaintiff bought at the execution sale, was wholly insolvent, had been absent from the state two or three years and not heard of since the death of Joseph, that James' indebtedness to the estate was five or six thousand dollars, and his distribution share would not pay ten per cent of it; that if all the heirs of Joseph took an equal share of Joseph's interest in the land in suit, each would get eight and eight-ninths acres, worth twenty dollars an acre.

Sometime after the cause had been submitted on the proof and taken under advisement, at the next term of court, the death of James E. King was suggested, and that he left no heirs except his brothers and sisters, the defendants in the suit, and thereupon the suit as to him was dismissed and the court rendered judgment in favor of the plaintiff, finding that plaintiff, as purchaser of the share of James E. King, owned one thirty-sixth interest in the three hundred and twenty acre tract, that A. A. King owned ten thirty-sixths interest, that E. P. King, David King and Thomas King each owned a seven

thirty-sixth interest, and four other defendants named owned each one thirty-sixth, and decreed the land to be sold by the sheriff for partition. From that decree the defendants appeal.

The plaintiff has no substantial interest in this land. He holds under his sheriff's deed the bare legal title which his judgment debtor inherited, charged with a debt in favor of the estate far beyond its value. He stands in the shoes ²⁴⁸ of his judgment debtor. Suppose there had been no sheriff's sale and James E. King had brought this suit against the administrator and the heirs of Joseph L. King, asking to have partition of this land, and his undivided share set apart to him, and the defendants had answered and shown that he owed the estate of his deceased brother ten times as much as his inherited share was worth and was himself utterly insolvent and unable to pay any part of it, can it be conceived that any condition of the law could be found that would require the court to decree what he asked?

In *Lietman v. Lietman*, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307, a legatee who was indebted to the testator at his death for more than the amount of the legacy endeavored on final settlement of the estate to obtain his legacy, he being then a nonresident and the debt against him not reduced to judgment, but the court held that he was not entitled to it. Marshall, J., speaking for the court, after laying down the rule that the indebtedness of the legatee or distributee was assets of the estate to be deducted from his legacy or distribution share, said: "The reason, necessity and wisdom of the rule are strikingly illustrated in this case, where an insolvent, non-resident legatee seeks to diminish the distributive shares of others, by claiming a part of the estate, while he owes the estate twice as much as his legacy amounts to." And in *Duffy v. Duffy*, 155 Mo. 144, 55 S. W. 1002, the same principle was applied to an heir who sought partition of the land that had descended to him and others. Marshall, J., spoke for the court in that case, also, and referring to the *Lietman* case as deciding the question, said: "True, in that case the debt due the estate was deducted from a specific legacy, while here the debt is asked to be deducted from the plaintiff's interest in the real estate described, but the principle involved is the same." The fact that in the *Duffy* case the debt had been reduced to judgment did not affect the decision. Here we have a non-resident debtor, not only beyond the reach of ²⁴⁹ process, but utterly insolvent, whom to attempt to sue would be worse than idle.

In such case if the debt due the estate by the heir were less than the value of his share, if the partition would not embarrass the due course of the administration, the court would decree the partition deducting the debt owing by the plaintiff from his share, but in the facts before us where the debt is more than the share, the plaintiff has no standing in court and his bill should be dismissed.

The judgment of the circuit court is reversed.

All concur.

This Case was Directly Approved and its ruling adopted in the subsequent cases of *Ayres v. King*, 168 Mo. 244, ante, p. 452, 67 S. W. 558, and *King v. Ayres*, 168 Mo. 250, 57 S. W. 1100. In the first of these cases the facts were precisely the same, except that different property was involved in the partition proceedings. In the second case the parties were reversed, the defendants, King et al., being the plaintiffs and asking for partition as against the judgment creditor Ayres. The lower court decreed a partition, but on appeal this was reversed, by reason of the proceedings pending in the probate court, and the cause was remanded to the lower court with directions to retain the cause, but to suspend judgment until the probate administration was closed, or until the court was satisfied that the particular property involved would not be needed to pay debts of the estate, and then to proceed as the exigencies of the case required.

Legacies.—In the distribution of a decedent's estate, the probate court has power to deduct the debts of an insolvent legatee from the legacy bequeathed to him: *Lietman v. Lietman*, 149 Mo. 112, 73 Am. St. Rep. 374, 50 S. W. 307.

Partition in connection with the distribution of the estates of decedents is discussed in the monographic note to *Buckley v. Superior Court*, 41 Am. St. Rep. 140-151. One of two heirs is entitled to partition while the estate is in course of settlement in the probate court: *O'Brien v. Mahoney*, 179 Mass. 200, 88 Am. St. Rep. 371, 60 N. E. 493.

ROUSE v. CATON.

[168 Mo. 288, 67 S. W. 578.]

HOMESTEAD—Title in Wife's Name.—Land is none the less a homestead because the title thereto is taken in his wife's name, if the purchaser declared he intended it to be such at the time he purchased it. (p. 459.)

A HOMESTEAD may be Abandoned by the owner moving elsewhere with his family and occupying other land which he declares to be his homestead. (p. 459.)

HOMESTEAD.—It Requires both Ownership and Occupancy to constitute a homestead. (p. 459.)

HOMESTEAD.—No Head of a Family can have Two Homesteads at the same time. (p. 459.)

HOMESTEAD.—A Husband and Wife while living together cannot each have a separate homestead at the same time. (p. 459.)

FRAUDULENT CONVEYANCES—Subsequent Insolvency.—A deed made by a grantor, when he is entirely solvent, to his infant children, may be fraudulent and void as to subsequent creditors who have no knowledge thereof, where such deed was never delivered or recorded, the grantor retained dominion over it, and it was kept off the records for the purpose of enabling him to incur indebtedness on the strength of his supposed ownership. (p. 460.)

Lander & Lander, for the plaintiffs in error.

A. W. Mullins, for the defendants in error.

293 BRACE, P. J. The defendants in this case are Luke T. Caton and his two sons, Leo T. Caton and Harry L. Caton.

By deed dated August 26, 1895, acknowledged September 5, 1895, and recorded on July 20, 1896, the said Luke T. Caton and wife conveyed to the said Leo T. Caton and Harry L. Caton the east half of the southeast quarter and the southwest quarter of the southeast quarter of section 16, and the northeast quarter of section 21, in township 58, range 18, in Linn county, containing two hundred and eighty acres.

On July 23, 1896, the plaintiff, J. W. Rouse, instituted a suit by attachment in the circuit court of said county against the said defendant, Luke T. Caton, which was duly levied on said lands, and which was thereafter duly sustained, and therein on April 26, 1897, the plaintiff obtained judgment against the said Luke T. Caton in the sum of four thousand six hundred dollars and fifty-seven cents and costs. In pursuance of an execution issued on this judgment, the said real estate was duly sold, and the plaintiff became the **294** purchaser thereof for the sum of two thousand dollars, received a sheriff's deed therefor, and thereafter instituted this suit.

The petition is in two counts. The first in the nature of a bill in equity to set aside said deed of Luke T. Caton of date August 26, 1895, on the ground that it was made without consideration, and for the purpose of hindering, delaying and defrauding his creditors, and the second, in ejectment, to recover possession of the premises. The finding on both counts was in favor of the plaintiff, and defendants' motion for rehearing and a new trial having been overruled, they bring the case here by writ of error.

The facts of this case, so far as they can be made out from the imperfect transcript of plaintiff in error, which contains but a fragment of the evidence, eked out by that of the defendants in error, seem to be about as follows:

In 1890 Luke T. Caton was the owner of the two hundred and eighty acres of land in controversy, which, in connection with another forty-acre tract, the title to which was in his wife, constituted his home place, on which he resided with his family. He owned other lands and a one-half interest in a saloon in the town of Bucklin, some two or three miles distant from his home farm, and some personal property. He was then in comfortable circumstances and entirely solvent. In the fall of that year he and his wife signed and acknowledged a deed conveying the home farm to one John C. Whittaker, and a few days thereafter the said Whittaker signed and acknowledged a deed conveying said premises to Fannie Caton, the wife of the said Luke T. Caton, and his two sons, Leo T. Caton and Harry L. Caton. These deeds were never recorded, and remained in the possession or under the control of said Luke T. and his wife from the time they were so signed until they were produced on the trial of this cause. At the time these deeds were so signed and acknowledged, his son Leo was aged about twenty years and his son Harry was about nine years old. It is conceded that these deeds were ²⁹⁵ without valuable consideration. As counsel for defendants say in their brief: "This roundabout transaction was only to avoid a direct conveyance to the wife."

Afterward the deed in controversy, conveying the two hundred and eighty acres aforesaid, to the said Leo T. and Harry L. Caton, was signed by the said Luke T. Caton and wife and acknowledged on the fifth day of September, 1895. This deed was also without any valuable consideration, and remained in the possession and under the control of the said Luke T. and his wife until it was filed for record on the 20th of July, 1896.

Up to the time of the filing of this deed for record, Luke T. Caton always claimed and treated this land as his own, gave it in to the assessor, paid the taxes on it and encumbered it by mortgage, and was considered by everyone dealing with him as its owner, and neither Leo T. or Harry L. ever made any claim or ownership to it.

In the spring of 1891, Luke T. Caton with his family, except his son Leo, moved from his home farm to the town of Bucklin, distant two or three miles therefrom, where he and his family continued thereafter to reside until about the middle of May, 1897, when they moved back to the home farm. In the meantime, Leo was left in charge of the farm, its stock and equipment, with the understanding between him and his father that he should run the place, and if anything was made in operating it he should have the profits. On removing to Bucklin, Luke T. Caton purchased an interest in a flouring-mill in operation there, and other property, and after renting for a short time, purchased a dwelling-house and lot on the 3d of August, 1891, into which he then moved, with his family, and where thereafter they continued to reside until about the middle of May, 1897, when he returned to the farm. The purchase money for this homestead was paid by Luke T. Caton, but the deed was taken in the name of his wife and duly recorded December 16, 1893. Thus the said Luke T. Caton continued living with his family in this homestead ²⁹⁶ in Bucklin, carrying on his farming, milling and saloon business from the spring of 1891 until the fall of 1895, during which time he incurred an indebtedness in excess of the value of all his property, and became insolvent. It was under these circumstances that the deed in question was thereafter made. The plaintiff's debt was one of the many incurred by him during this period on the faith of his ownership of this two hundred and eighty acres of land in question and other lands, as shown by the records. No error is assigned upon any action of the court in the trial of the case. But a reversal of the decree and judgment is urged on the grounds:

1. That Luke T. Caton had a homestead in this land which was not set off to him before the sale under the execution; hence, under the rulings of this court in *Macke v. Byrd*, 131 Mo. 682, 52 Am. St. Rep. 649, 33 S. W. 448, *Ratliff v. Graves*, 132 Mo. 76, 33 S. W. 450, and *Creech v. Childers*, 156 Mo. 338, 56 S. W. 1106, the sale was void. This contention is not tenable. At the time when the indebtedness of Luke T. Caton to the plaintiff was incurred, when he was sued thereon by at-

tachment and the writ levied on the premises, and even when judgment therein was rendered against him, he was living with his family on his homestead in the town of Bucklin. This was none the less his homestead (as he declared he intended it to be at the time he purchased it) because he took the deed thereto in his wife's name. While he continued to own the farm of which the two hundred and eighty acres sold under execution was a part and in which he formerly had a homestead, he had abandoned it as a homestead in 1891, and as against the rights which had accrued to the plaintiff after that time and before his return to it in 1897, he had no homestead right therein. It requires both ownership and occupancy to constitute a homestead, and no head of a family can have two homesteads at the same time, neither can husband and wife while living together each have a separate homestead at the same time: Thompson on Homestead and Executions, secs. 225, 245, 246; Freeman on Executions, sec. 248; 15 Am. & Eng. Ency. of ²⁹⁷ Law, 566, 575, 602; St. Louis Brewing Assn. v. Howard, 150 Mo. 445, 51 S. W. 1046; Peake v. Cameron, 102 Mo. 568, 15 S. W. 70; Kendall v. Powers, 96 Mo. 142, 9 Am. St. Rep. 326, 8 S. W. 793; Bunn v. Lindsay, 95 Mo. 250, 6 Am. St. Rep. 48, 7 S. W. 473; Finnegan v. Prindeville, 83 Mo. 517.

2. That as the amount of plaintiff's bid at the sale, less the costs, was credited on the execution, and no new consideration passed, the plaintiff was not an innocent purchaser, but took his title subject to all infirmities; that the rule of caveat emptor applies, and the unrecorded deeds conveying the two hundred and eighty acres by Luke T. Caton and wife to Whittaker and from Whittaker to Luke T. Caton's wife, and his sons Leo and Harry Caton in 1890, when Luke T. Caton was entirely solvent, stand good and valid as against the plaintiff. This is an attempt to protect one fraud by another. It is true that if the deeds of 1890 had been delivered and recorded, when they were signed and acknowledged, they would have vested Luke T. Caton's title in the grantees therein named as against subsequent creditors. But as these deeds were never in good faith delivered for the purpose of vesting title in such grantees, but ever remained either in the possession or under the dominion and control of Luke T. Caton from the day of their date until they were produced on the trial of this cause, until which time neither plaintiff nor any other of his creditors had any notice of their existence, and were purposely kept off

of the records, whereby he was enabled on the faith of his ownership of these and other lands, to incur the very indebtedness which he now seeks to defeat by them, they were fraudulent and void as to plaintiff, and as to such creditors passed no title as against the plaintiff, and the court committed no error in vesting the title in the plaintiff, and in awarding him the possession of the premises.

The decree and judgment of the circuit court will therefore be affirmed.

All concur.

Homesteads.—The necessity of occupancy of property in order to impress it with the character of a homestead is considered in *Gill v. Gill*, 69 Ark. 596, 65 S. W. 112, 86 Am. St. Rep. 213, and cases cited in the cross-reference note thereto. Of course, a homestead may be abandoned, but a temporary removal does not work an abandonment: *Farmers' etc. Loan Assn. v. Jones*, 68 Ark. 76, 82 Am. St. Rep. 280, 56 S. W. 1062; *Minnesota Stoneware Co. v. McCrossen*, 110 Wis. 316, 84 Am. St. Rep. 927, 85 N. W. 1019; *Lyons v. Audry*, 106 La. 356, 87 Am. St. Rep. 299, 31 South. 38. The husband, not the wife, is primarily the head of the family, and the law tolerates but one head and one exemption for one family: *Ness v. Jones*, 10 N. Dak. 587, 88 Am. St. Rep. 755, 88 N. W. 706. A person cannot have two homesteads at one time: *Kaes v. Gross*, 92 Mo. 647, 1 Am. St. Rep. 767, 3 S. W. 840; *Waggle v. Worthy*, 74 Cal. 266, 5 Am. St. Rep. 440, 15 Pac. 831.

Fraudulent Conveyances—Subsequent Creditors.—A conveyance though fraudulent as to existing creditors of the grantor, is not necessarily fraudulent per se as to his subsequent creditors. Whether it is fraudulent as to them is to be determined by all the circumstances: *Lander v. Ziehr*, 150 Mo. 403, 51 S. W. 742, 73 Am. St. Rep. 456, and cases cited in the cross-reference note thereto; note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 751-754.

Fraudulent Conveyances—Parent and Child.—If a conveyance from an insolvent debtor to his children and the circumstances under which it was made bear the semblance of an attempt to cover up the grantor's property, and his creditors bring suit to set the conveyance aside, the burden is on the defendants to show that the transfer was in good faith, and for a valuable consideration: *Bank of Colfax v. Richardson*, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359. See, in this connection, *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908; *Gleitz v. Schuster*, 168 Mo. 298, post, p. 461, 67 S. W. 561.

GLEITZ v. SCHUSTER.

[168 Mo. 298, 67 S. W. 561.]

FRAUDULENT CONVEYANCE.—Where a Father Deeds Property to His Children for a debt due them, the fact that he goes back forty years to bring up old gifts of small amounts to show an indebtedness equal to the value of the property is evidence of a fraudulent intent. (p. 464.)

FRAUDULENT CONVEYANCE.—Deed to Children.—Where a Father Honestly Owes his children a large amount, the fact that he deeds property to them, the value of which exceeds such amount will render the children liable to their father's creditors, if at all, only for the excess, there being no fraudulent intent on their part. (p. 464.)

FRAUDULENT CONVEYANCE.—Intent.—If Children Who Receive a Conveyance from their father for an alleged debt are conscious that a portion of the debt is fictitious, they are chargeable with the fraudulent purpose of their father, and the whole transaction is void as to creditors. (p. 464.)

FRAUDULENT CONVEYANCE.—The Fact that Children Allow Their Father to Use the Rents of property for himself after he has conveyed it to them does not show a fraudulent intent, where such rents amount to only a small sum, and the father is old and incapable of doing any work, and had nothing to live on. (pp. 463-465.)

FRAUDULENT CONVEYANCE.—A Creditor, Who Sues His Debtor, attaches property fraudulently conveyed, and purchases it at execution sale, acquires a good title as against the grantees and other creditors, and a conveyance by him to the grantees in the fraudulent deed gives them good title. (pp. 464, 465.)

Charles M. Street and Culver & Phillips, for the appellant.

Johnson, Rusk & Stringfellow and Booher & Williams, for the respondents.

³⁰² VALLIANT, J. Plaintiff, a judgment creditor of defendant August Schuster, files this suit in equity to set aside two deeds made by her debtor to the other defendants, who are his children, on the ground that they were made to defraud his creditors in general and the plaintiff in particular.

The petition sets forth the plaintiff's judgment at law for \$1,675, the insolvency of the judgment debtor, his ownership of the property, which consists of certain lots with improvements in the city of Savannah, the conveyance to the other defendants, his children, which it alleges was "without any consideration whatever," and for the purpose of placing the same beyond the reach of his creditors. The answer was a general denial. There was a decree for defendants dismissing the bill, and the plaintiff appeals.

The only statement in the petition as of a fact constituting the alleged fraud is that the insolvent debtor made the conveyance to his children "without any consideration whatever." The consideration for the deeds was the only point in dispute at the trial. It was agreed that the property conveyed was worth \$6,000. It is conceded by appellant that at the date of the deeds, March 3, 1894, defendant, August Schuster, owed his six children \$4,087.83, but it is contended that one-sixth of that sum was owing to a daughter, Mrs. Smissen, who was not named in the deeds, or had previously been paid to her, and that the amount then due the five children who were grantees in the deeds was only \$3,406, which was about \$2,600 less than the value of the property. The amount conceded ³⁰³ to be due was made up of \$1,000 given by the children's grandfather to their father for them in 1885, and a legacy left them in their grandfather's will, of which their father was executor, amounting to \$1,749.28, and six per cent interest on these two sums. The testimony on the part of the defendants tended to show that in addition to those two sums the grandfather of these children had, as far back as 1860, 1862, and 1873, given to their father the sums of \$150, \$200, and \$500 for them, and that he agreed to hold it for them in trust, use it and pay them interest on it. The grandfather, Graff, had six children, and at the times he made these three last-mentioned gifts he gave an exact equal amount to each of his other children, giving the several amounts to each of his other five children in person, but the share to defendants' mother, who was then living, was given to her husband, and the plaintiff contends that under the common law which was then in force the gifts of money to the wife into the hands of her husband made it his. Although the only testimony in the case as to the express terms on which these three sums were given is that of the defendant August Schuster himself (the grandfather of the children and their mother being now dead), and his testimony being that it was given him in trust for his children, the plaintiff contends that that statement is unworthy of belief in the face of the fact that when the several sums were thus given to the father of those children, their mother being then alive, their grandfather gave like sums direct to each of his other five children for their own immediate use. But for defendants the evidence shows that August Schuster at that time was a very prosperous business man, and his wife did not need the money as the others did, and that there was

this reason for treating the gifts to her differently from those to the others.

The plaintiff at the trial was at a disadvantage, from the fact that she had no evidence on the disputed points except what she was able to obtain from the defendants themselves, ³⁰⁴ some of whom she made her witnesses, but they, being the children, and some of them unborn when some of the gifts were made, had really no personal knowledge of the facts, could only speak of family history or understanding. In their testimony they sometimes spoke of these three early gifts as gifts to their mother, but when their attention was drawn to the point, whether entirely ingenuous or not, they said that the understanding was that they were given to their father for their mother and her children.

The evidence showed that after the deeds in dispute were made August Schuster collected the rents and used them to live on, and exercised control and management of the property as he did before. Against this it was shown that there was no understanding on this point between the old man and his children before the deeds were made, but that afterward they allowed him to have the rents, which amounted to only about forty dollars a month, because he was old and incapable of doing any work and had nothing to live on, whereas they were able to take care of themselves.

The testimony of the defendants also tended to show that the oldest child of August Schuster, Mrs. Smissen, had been living in Texas ever since her marriage, and that during the times when her father was a wealthy and prosperous business man he had given financial assistance to her and her husband, not as in payment of her share of the money due her from her grandfather's gifts, but of his own paternal care, and that in consequence of this fact she had waived her rights to the funds in question in favor of her sisters and brothers who had received nothing.

Plaintiff introduced testimony to show that soon after the deeds in question were made the Farmers' Bank of Savannah brought suit by attachment against August Schuster, attached this property, obtained judgment and brought the property under execution, and afterward, by agreement with the defendants, permitted them to sell part of the property and apply ³⁰⁵ the proceeds, amounting to about \$1,500, to the payment of the debt for which the attachment had issued, and then the bank deeded the rest of the property to three of the defendants.

That was prior to the judgment obtained by the plaintiff in this case.

The chancellor found that August Schuster made the deeds with the fraudulent intent to place the property beyond the reach of his creditors, but that the other defendants, the grantees in the deeds, did not share in that purpose and on that finding dismissed the bill.

The fact that the defendants had to go back to 1860, 1862 and 1873 to bring up old gifts of small amounts which with the accumulation of interest for all those years were necessary to show an indebtedness equal to or exceeding the value of the property—gifts of which no separate account was kept and no separate investment made—presents a feature of the case that is not favorable to the defendants, and was perhaps the fact that influenced the finding of the chancellor on the question of the intent of the grantor, and we cannot disapprove that finding.

But the fact, independent of those old items, is, that Schuster did honestly owe his children a large proportion of the amount he claimed to have owed them, and, whatever his purpose may have been, there is nothing in the record to show that his children had any other purpose in view than satisfaction of the amount owing them. How much, if anything, over and above, the \$4,087.83 was due them they did not know beyond vague family history, and from what their father said. If, therefore, in the transaction they received more value than they were entitled to, it could be called nothing worse than a mistake on their part and render them liable to the creditors of their father, if at all, only for the excess. If they received the deeds conscious that a portion of the debt was fictitious, they would be chargeable with the fraudulent ³⁰⁶ purpose and the whole transaction would be set aside. In such a case a court of equity would not uphold the deeds to the extent that they were supported by a valid consideration and condemn them only to the extent of the fictitious indebtedness. If the conduct of the grantees was tainted with fraud, the whole deeds would be set aside: *State v. Hope*, 102 Mo. 410, 14 S. W. 985. But such is not the case. The fact that they allowed their father to use the rents for his own living is satisfactorily explained and the suspicion that would otherwise arise from that fact is removed.

The plaintiff's bill being shaped on the theory that the grantees were guilty of fraud, and for that reason their deeds should be set aside, and the evidence not sustaining that view, the chancellor was justified in rendering the decree for the de-

fendants, and we might well leave the case at this point. But as the plaintiff has gone further and introduced in evidence the transactions with the Farmers' Bank of Savannah as bearing on the charge of fraud, we deem it proper to notice that branch of the case. The bank brought suit by attachment against the grantor in these deeds (the grantees not being parties to that suit), obtained judgment, caused the property in question to be sold under execution, and bought it in. If the theory of the plaintiff's petition is correct—that is, if the deeds from August Schuster to his children were fraudulent and void—then the property was subject to the attachment and sale at the suit of the bank, and the bank acquired a good title, not only as against these defendants, but as against all creditors of Schuster, the plaintiff included. Then when the bank transferred the title to part of the property to the three daughters of Schuster, they got a good title. The argument is made by the plaintiff that since the consideration for the deed from the bank to the three daughters was the proceeds of the sale made by them of part of the property to one Limerick, it was the proceeds of property belonging to their father, and therefore the deed from the bank to them inured ³⁰⁷ to his benefit. But that view of the case overlooks the fact that before the sale to Limerick the bank became the purchaser of all the property at the execution sale, and, on the plaintiff's theory of fraud, the title there acquired by the bank was all the title that Schuster had. Therefore, when at the instance of the bank the three daughters made the deed to Limerick and paid the proceeds of the sale to the bank, they were not paying proceeds of property then belonging to their father, but of property, on the plaintiff's theory, belonging to the bank. If the bank, after it had acquired the title, saw fit to recognize a claim in the children of Schuster under the deeds in question worthy of compromise, that is a matter that does not concern the plaintiff. The bank's title was good if the statements in the plaintiff's petition were true, and it cut out the plaintiff as well as any other subsequent judgment creditor. Taking from the property conveyed by the two deeds in suit from Schuster to his children, that part conveyed to Limerick, the proceeds of which went to the bank, it leaves the plaintiff's case deficient in proof to show that the value of the property remaining to them was in excess of the amount which it is conceded their father owed them.

The chancellor had the correct view of the case and the judgment is affirmed.

All concur.

Fraudulent Conveyance.—A Conveyance to a Son by a father who is deeply indebted, made without a valuable consideration, is fraudulent as to creditors: *Coleman v. Cocke*, 6 Rand. 618, 18 Am. Dec. 757; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; 5 South. 164; *Stumbaugh v. Anderson*, 46 Kan. 541, 26 Am. St. Rep. 121, 26 Pac. 1045. See, also, *Rouse v. Caton*, 168 Mo. 288, ante, p. 456, 67 S. W. 578. But where a parent in good faith emancipated his sons while he was in good financial circumstances, and thereafter, during their minority, they earned money which they loaned to him, a conveyance by him to them in consideration of such loans is upon a valuable consideration, and will not be set aside as in fraud of creditors: *Flynn v. Baisley*, 35 Or. 268, 76 Am. St. Rep. 495, 57 Pac. 908. Compare *Halliday v. Miller*, 29 W. Va. 424, 6 Am. St. Rep. 653, 1 S. E. 821.

STATE v. NOLAN.

[168 Mo. 446, 68 S. W. 346.]

CRIMINAL LAW.—In a Prosecution for Fraudulently Personating a Voter, the state must prove that the person whom the defendant is charged with personating was a qualified voter at the time of such alleged personation. (p. 467.)

EVIDENCE.—As Against One Who is Charged with Personating a Voter, an Election Register is not sufficient proof that the person whom he is charged to have fraudulently represented himself to be was a qualified elector at the time of such personation. (p. 467.)

T. J. Rowe, for the appellant.

Edward C. Crow, attorney general, for the state.

447 GANTT, J. The indictment in this case is bottomed on section 7261 of the Revised Statutes of 1889. The defendant is charged in the indictment with having feloniously, falsely and fraudulently personated Thomas Donlan, an elector, and feloniously, falsely and fraudulently attempted to vote in and on the name of Thomas Donlan, an elector at the election held on April 2, 1901, in the city of St. Louis for certain municipal officers of said city. Defendant entered a plea of not guilty. The court gave, among other instructions, the following: "You are further instructed that one whose name is duly registered on the register and poll-books of a voting precinct is presumed, until the contrary is shown, to be a duly qualified elector and entitled to vote." Defendant excepted to all the instructions and properly saved his exceptions. The jury found defendant guilty and assessed his punishment at two years in the penitentiary. In due time he filed his motions for a new trial and in arrest of judgment, which being overruled, he appealed to this court.

1. The offense with which defendant is charged is fraudu-

lently personating another elector at the municipal election in the city of St. Louis on April 2, 1901. Under the indictment and the statute, it was essential to prove that the person whom he is charged to have fraudulently represented himself to be in order to vote was a qualified elector at the time of said alleged personation. Without this there could have been no offense under the statute. No effort was made by the state to prove this beyond the production of the register of voters introduced by the state.

In *State v. Shelley*, 166 Mo. 619, 66 S. W. 430, this court said that though a man may be an elector at the time of his registration, "he may not have been alive at the time he was personated, or at that time he may have been a nonresident of the precinct, in which case, of course, no conviction could have been had, and the burden was on the state to establish something ⁴⁴⁸ more than the mere presumption, to establish beyond a reasonable doubt that the impersonated man was an elector of that particular precinct alleged in the indictment at the time defendant is charged with having personated him."

The indictment made the positive averment that Thomas Donlan was an elector at said election. Having alleged this, it was essential to prove it. Had Thomas Donlan offered to vote, the register would have required the election officers to recognize him as a duly registered voter, but when that register was offered to prove there was such an elector, as against the defendant who was charged with a felony, it did not supply the proof that there was such an elector. Defendant was no party to the making of that register, and he had the right to demand that the state should establish that there was such a man and elector as Thomas Donlan, and not merely that his name appeared on the register. To personate another, such other person must exist. This the indictment charged, and this the state was required to show, and did not by merely producing a register of his name. The instruction asked by defendant at the close of the state's case should have been given and its refusal was reversible error, and that given for the state should have been refused.

Judgment reversed and cause remanded for a new trial.

All concur.

Unlawful Voting.—An indictment charging one with voting at an election without having the legal qualifications of a voter is defective if it does not specify the qualifications which the defendant lacked to make him a legal voter: *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *Pearce v. State*, 1 Sneed, 63, 60 Am. Dec. 135. See, also, *State v. Bruce*, 5 Or. 68, 20 Am. Rep. 734; *State v. Pearson*, 97 N. C. 434, 2 Am. St. Rep. 303, 1 S. E. 914.

WILLARD v. DARRAH.

[168 Mo. 660, 68 S. W. 1023.]

WILLS.—Extrinsic Evidence is Admissible to Show a Testator's Intention, where the person or thing, the object or subject of a gift, is described in terms which are applicable indifferently to more than one person or thing. (p. 471.)

WILLS.—Extrinsic Evidence.—Where the description of a person or thing in a will is partly correct and partly incorrect, and the correct part leaves something equivocal, extrinsic evidence is admissible to show the testator's intention. (p. 471.)

WILLS.—Presumption of Intention.—Where a testator executes his will in due form, apparently disposing of all his property, the law presumes that it was his intention to dispose of his whole estate, and not to die intestate as to some of his descendants. (pp. 472, 473.)

WILLS.—Indirect Parol Evidence is always admissible to identify the objects of a testator's bounty. (p. 473.)

WILLS.—Parol Evidence.—Where There are Two Sets of Brothers of the same name, each having equal legal claims upon the testator's bounty, extrinsic parol evidence is admissible to determine which of the two sets he meant. (p. 473.)

WILLS.—The Word "Nephew" does not include grandnephew. (p. 473.)

WILLS.—Parol Evidence is Admissible to Solve a Latent Ambiguity produced by extrinsic evidence in the application of the terms of a will to the objects of a testator's bounty. (p. 474.)

WILLS.—The Testimony of the Scrivener of a Will, who by mistake wrote the word "nephews" instead of "grandchildren," is admissible to show the testator's real intention, where the description in the will is partly correct and partly incorrect. (p. 474.)

W. M. Williams and Duggins & Rainey, for the appellant.

Alfred F. Rector, A. R. Strother and Frank P. Seabee, for the respondent.

665 BRACE, P. J. This is a suit in ejectment for the possession of an undivided one-eighth interest in a tract of land in Saline county, described in the petition. William Nelson, late of said county, deceased, is the common source of title. He died testate on December 12, 1892, seised in fee simple of the premises, leaving him surviving three daughters, the defendant, Mariah Darrah, and her two sisters, Nannie Brown and Sarah Bryan, two sons, James Nelson and John Nelson, and four grandsons, Ord Nelson and Corley Nelson, sons of his deceased son Lawrence, and plaintiff John Willard and his brother, William Willard, sons of his deceased daughter Elizabeth. By his will the testator devised the premises in question to his said daughter, the defendant, Mariah Darrah, named therein, his sons James and John, made provision for his other two daugh-

ters, Nannie Brown and Sarah Bryan, and for his two grandsons, Ord and Corley Nelson, and made the following further devise:

"4. I give, devise and bequeath to my well-beloved nephews, John and William Willard, the following described tracts, lots or parcels of land situate in the county of Saline and the state of Missouri, to wit: The northeast quarter of the northeast quarter of section 22; the northwest quarter of the northeast quarter of section 22; the northwest quarter of the northwest quarter of section 23; all in township 51, range 23, and the sum of fifty dollars in money, to be paid them out of the proceeds of my personal property. To have and to hold the said ~~666~~ land unto the said John Willard and William Willard, their heirs and assigns forever."

On the trial the plaintiff introduced parol evidence tending to prove that at the time of his death the testator had a nephew named John D. Willard, and several grandnephews, sons of the said John D., one of whom was named John Willard and the other named William Willard, and upon these facts claimed that he was pretermitted in said will, and as one of the heirs at law of his grandfather is entitled to the interest sued for in the land devised to the defendant Mrs. Darrah. To meet this claim the defendant introduced evidence tending to prove that the said nephew John D. Willard, and the said grandnephews, John Willard and William Willard, sons of the said John D., were strangers to the testator, never visited him and never resided near him. That the grandsons, John Willard and William Willard, lived near their grandfather, owned land adjoining the land described in the fourth clause of the will, that he was very intimate and friendly with them, and repeatedly declared that he had bought this land for them, and also introduced E. M. Edwards, a lawyer, as a witness, who testified in substance that he drew the will at the request of the testator, who directed that this land should be given to the said grandchildren, John and William Willard, but by mistake he wrote the word "nephews" instead of "grandchildren" in that clause of the will. Without setting out this parol evidence at length, it is sufficient to say that it appears therefrom, beyond a reasonable doubt, that the testator intended by the fourth clause of his will to devise the land therein described to his well-known and well-beloved grandchildren, the plaintiff, John Willard, and his brother, William Willard, and not to his two grandnephews of the same names, who were not personally known to or well

beloved of him. The case was tried before the court without a jury. The court rejected the evidence of Edwards, the scrivener, found the issues for the plaintiff, and ⁶⁶⁷ from the judgment in his favor the defendant appeals. And thus the only question for determination in the case is presented.

Unless the devise in the fourth clause of the will is to the plaintiff and his brother William, the plaintiff is not named or provided for in the will of his grandfather. As to him, he died intestate, and the judgment is for the right party: Rev. Stats. 1899, sec. 4611. The devise is to them, however, if such was the intention of the testator, and in determining whether such was his intention, resort to extrinsic evidence is necessary from the very nature of the inquiry, which is not as to the context of the will, but as to its application to persons external, i. e., the identification of the beneficiaries. The difficulty in such cases is to determine how far in that direction the courts may go in order to discover the true intent and meaning of the testator.

It is well-settled law "that for the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling it to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will (Wigram on Wills, 51)": *Riggs v. Myers*, 20 Mo. 243. And such inquiry may extend to the whole environment of the testator, and to his feelings toward those named as beneficiaries or naturally tied to him: *Robards v. Brown*, 167 Mo. 447, 67 S. W. 245; *Webb v. Hayden*, 166 Mo. 46, 65 S. W. 760, and cases cited. In *Creasy v. Alverson*, 43 Mo. 13, the instructions given by the testator to the scrivener of his will were held to be within the rule approved in *Riggs v. Myers*, 20 Mo. 243, for the purpose of identifying a tract of land misdescribed in the will by mistake of the ⁶⁶⁸ scrivener. In *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128, for a like purpose a prior informal unattested will of the testator was admitted in evidence, and in *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642, direct extrinsic evidence of intention was admitted for the purpose of showing a devisee was meant who was misnamed in the will. There is much conflict of judicial opinion on the subject. The cases are numerous and irreconcilable;

many of them are cited in the briefs of counsel. They have been so often reviewed that a further review seems a work of supererogation. A learned and able text-writer, from such a review, deduces the following conclusion: "The two classes of cases, then, in which direct evidence dehors the will appears admissible to show the testator's intention, are these: 1. Where the person or thing, the object or subject of the disposition, is described in terms which are applicable indifferently to more than one person or thing; 2. Where the description of the person or thing is partly correct and partly incorrect, and the correct part leaves something equivocal. Or, perhaps, to take a broader view of the subject, extrinsic evidence of intention may be admitted whenever the instrument is insufficiently expressed or applied in terms so as to raise a doubt of the object or subject intended, and in order to give the disposition effect, that doubt must be cleared and the insufficiency supplied. On the other hand, such extraneous proof should be ruled out, whenever its tendency is to establish an intention different in essence from what the will expresses on its own face; for when admissible, it is in aid of the testator's expressed intention, not against it": Schouler on Wills, 3d ed., sec. 576.

In another valuable and more recent work, in which the citation of cases is brought up to date, the law on the subject is more elaborately stated as follows: "In every case the court is entitled to be placed in possession of all the information which is available of the circumstances of the estate and family of the testator when he made ⁶⁶⁹ his will, to the end that the court may be in his situation as nearly as may be, and may interpret and understand the will as he would if he were living. When the evidence of extrinsic circumstances is all in, it may appear that a description in the will which was intended by the testator to apply to one object or thing is applicable, with more or less certainty, to several objects or things. This is a case of latent ambiguity, and parol evidence is then received to ascertain which person or thing was intended by the testator. Where the ambiguity is latent, it is created by evidence of extrinsic facts, and the same evidence is admissible to remove it. But such evidence is not direct evidence of intention, and if the rule in relation to the reception of parol evidence to solve latent ambiguities permitted the introduction of such evidence only, it would not require a separate discussion, as it would be synonymous with the rule that extrinsic facts are always admissible to explain the language of the will, regardless of the nature

of the ambiguity, whether it be patent or latent. The principle goes much further than this. It is not to be confined to the admission of facts appertaining solely to the circumstances of the testator, and which merely tend to show the meaning of his words. Under it evidence showing or suggesting a direct inference of intention as to the things or objects disposed of in the will, including the testator's declarations of intention uttered at the execution of the will, and, according to some of the cases, subsequently thereto, are received to assist the court in disposing of the latent ambiguity, by showing which of several persons or things answering to the description was intended by the testator. Hence, it will be seen that there may be, and usually is, an essential and radical difference between the evidence which raises or creates the latent ambiguity, i. e., proof of extrinsic circumstances of the case, and the evidence which removes it or explains it, and which may be declarations of the intention of the testator as well as evidence of circumstances.

670 "It is not necessary, in order that parol evidence may be received, that the description in the will shall apply precisely and in every respect to two or more persons or things. In some cases where the rule has been invoked, two persons of exactly the same name, or answering precisely to the same description, have claimed. But the law requires only that the testamentary description shall apply to the several objects with legal certainty, so that the mind of the court is satisfied. The description, whether by name, locality or occupation, must be sufficient to fairly satisfy the court that the testator may have meant either of the several persons or things which are revealed by the extrinsic evidence. . . . Thus, if a benefit is claimed by several persons, all answering the description of the will in one or more material particulars, though none of them answers to it perfectly and accurately in every particular, extrinsic evidence is received, including expressions of intention": 2 Underhill on the Law of Wills, sec. 910.

From a careful examination of many of the legion of cases bearing on this subject, we are satisfied that the doctrine announced by these text-writers is supported by the weight of authority, and being consonant with justice and reason, and promotive of that public policy declared by statute, which requires all courts in the execution of wills to have due regard to the true intent and meaning of the testator, it may well be adopted as furnishing to a certain extent practical, working rules for such cases. Mindful thereof, then, we start out in this case

with the testator's will in hand, for the purpose of ascertaining whether the plaintiff, according to the true intent and meaning of the testator, is named or provided for in his will, and we start with the legal presumption that he is named or provided for therein, for having executed his will in due form, apparently making a complete disposition of all his property, the law presumes that it was the intention of the testator to dispose of his whole estate by will and not to die ⁶⁷¹ intestate as to his grandsons John and William Willard, and have part of his estate pass by will and part by descent: *RoBards v. Brown*, 167 Mo. 447, 67 S. W. 245; *Watson v. Watson*, 110 Mo. 164, 19 S. W. 543. Coming to the fourth clause of the will, we find therein a devise and bequest of certain real estate, and a sum of money to "John and William Willard."

From the way the names are coupled together in this joint devise, we at once conclude that these persons are of the same class—that is to say, are brothers having equal claims upon the bounty of the testator. If the devise had been in this form, simply, without further descriptive words, and upon inquiry it was found from the indirect parol evidence, which is always admissible for the purpose of identifying the object of the testator's bounty, that there were two sets of brothers, each named "John and William Willard," and each having equal legal claims upon the testator's bounty, there could be no question under all the authorities that direct parol evidence, dehors the will, of the testator's intention would be admissible to determine which of the two sets he meant (*Schouler on Wills*, 3d ed., sec. 575), the case coming then within that class where the object of the disposition is described in terms applicable indifferently to both. The devise in this instance is, however, apparently more specific. It is to "my well-beloved nephews John and William Willard," and it is found from the indirect parol evidence that there are two sets of brothers, each named "John and William Willard," the plaintiff and his brother, "well-beloved" grandsons of the testator, and two grandnephews, not "well-beloved" of him, and having no legal or moral claim on his bounty.

As to each of these sets of brothers the description contained in the will is partly correct and partly incorrect. It is correct as to the Christian and surnames of each set; it is correct as to neither in the superadded description of relationship to the testator, as the word "nephew" simpliciter cannot be held to include grandnephews (*Underhill on Wills*, sec. ⁶⁷² 596;

Matter of Woodward, 117 N. Y. 522, 23 N. E. 120; 16 Am. & Eng. Ency. of Law, 485), and the inapplicability in this case is reinforced by the word "beloved" prefixed thereto. So that the description in the will, when it comes to be applied to those only who can possibly have been intended, is just as equivocal in point of fact as if these additional words of description had been omitted, as in the first case supposed.

The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers, but it is morally and legally certain that it was intended to apply to one or the other, thus bringing the case within the rule established by the second class of cases in which direct or extrinsic parol evidence including expressions of intention are admissible. Such evidence was therefore admissible in this case in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the will to the objects of the testator's bounty, to prevent the fourth clause of the will from perishing, and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the will, but to let in light by which that intention, rendered obscure by outside circumstances, may be more clearly discerned, and the will of the testator in its entire scope effectuated according to his true intent and meaning. Hence, we conclude that the court erred in rejecting the evidence of the scrivener, Edwards, and in holding that the plaintiff was not named or provided for in the will of his grandfather, the said William Nelson. The judgment of the circuit court is therefore reversed.

All concur.

Wills—Partial Intestacy.—The presumption is, that the testator intended to dispose of his entire estate, and not to die partly intestate: In re Donge's Estate, 103 Wis. 497, 74 Am. St. Rep. 885, 79 N. W. 786; Succession of Allen, 48 La. Ann. 1036, 20 South. 193, 55 Am. St. Rep. 295, and cases cited in the cross-reference note thereto.

Wills.—Extrinsic Evidence to explain wills is considered in the monographic note to Chappell v. Missionary Society etc., 50 Am. St. Rep. 279-294. Parol evidence may be heard to indentify the property and the beneficiaries named in a will: Gaston's Estate, 188 Pa. St. 374, 68 Am. St. Rep. 874, 41 Atl. 529.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

FORMAN v. BREWER.

[62 N. J. Eq. 748, 48 Atl. 1012.]

THE COMMON STATUTE OF LIMITATIONS, and the analogous bars and presumptions in equity and at law, cease to operate against a claim from the time when it is submitted to the jurisdiction of the court. (p. 476.)

EQUAL EQUITIES.—Where Parties Who Hold Claims against property are equal equitably, the one who holds the legal title to the property should prevail. (pp. 476, 477.)

Herbert A. Drake, for the appellants.

Samuel H. Grey, for the respondents.

749 **DIXON, J.** The decree in this case, from which Reeve's executors and Horner's administrators appeal, rests in part upon the proposition that the judgment recovered January 19, 1872, by Thomas J. Smith against Henry C. Forman, which was assigned to Reeve on May 19, 1888, and the judgment recovered by Horner against Henry C. Forman on June 3, 1873, are to be considered as outlawed in this proceeding, because Reeve and Horner filed their answers and cross-bills in the cause after the expiration of twenty years from the date of their judgments. This proposition is unsound.

The original bill was filed in April, 1889, by Henry C. Forman, to have it decreed that a certain tract of land, the legal title of which had been conveyed by him to Bulson on December 14, 1871, and had always since that date been out of Forman, was in equity Forman's property, and that those who had held the legal title were only mortgagees or trustees. This bill set forth the above judgments, brought in Reeve and Horner as de-

defendants, and prayed, *inter alia*, that their interest in the premises as judgment creditors might be determined by the court. By the final decree made May 25, 1900, the complainant is regarded as equitable owner of the land and held to be entitled to redeem the same from the encumbrances thereon, and in default of his so doing within the time limited, the land is ordered to be sold ⁷⁵⁰ to raise and satisfy the sums due thereon, and the residue of the proceeds of sale is ordered to be paid to the complainant.

In this situation it is manifest that the allegations of the bill alone are sufficient to establish the equitable lien of the judgments on the complainant's estate in the land, and to require the court to determine whether they shall be paid out of the proceeds of sale before the residue is turned over to the complainant. Neither answer nor cross-bill was necessary to complete the jurisdiction of the court over the matter thus presented, and when by service of process the judgment creditors were brought in, their status in the cause was so far fixed that the mere lapse of time afterward could not impair their claims in that suit. The common statute of limitations, and the analogous bars and presumptions in equity and at law, are regarded, for all purposes of the pending litigation, as having ceased to operate against a claim from the time when it was submitted to the jurisdiction of the court: *Gregory v. Hurriell*, 3 Brod. & B. 212, 1 Bing. 324; *Sterndale v. Hankinson*, 1 Sim. 393; *National Bank v. Sprague*, 21 N. J. Eq. 530; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647; *Smith v. Crater*, 43 N. J. Eq. 636, 12 Atl. 530. These judgments, therefore, must have such effect as they were entitled to at the commencement of the suit.

The principal defendant in the bill was Edmund Brewer, who had held legal title to the land since May 10, 1879, by deed from Bulson, and had also received a conveyance from Forman in December, 1873. In equity Brewer held his title as security for his advances to and on account of Forman.

The appellants contend that their judgments should be decreed to have been liens upon the land from the dates thereof, and should have priority over all advances made by Brewer after those dates, except advances made to discharge prior encumbrances. This contention might prevail if the legal title to the land had been in Forman, so that the judgments against him constituted a legal lien. But as Forman has never had legal title since the judgments were entered, the appellants must

rest solely on their equitable claims, and we think that the relations of Forman and Brewer were such as to make the latter's claim for his advances as good in equity as those of the judgment creditors, ⁷⁵¹ in view of their knowledge and acquiescence in the situation. Hence, the legal title vested in Brewer should not be taken away without conceding to him whatever protection it may afford for the payment of his just debts.

As to the Smith judgment of January 19, 1872, the evidence shows that Forman, the judgment debtor, agreed with the judgment creditor to settle it for fifty dollars, and then asked Reeve to pay that sum and take an assignment of it. Reeve did so on May 19, 1888. It should therefore be held by his executors for that sum only, with interest. There is no evidence that this claim was ever paid by Brewer.

The decree below should be modified in favor of the appellants by deducting from Brewer's judgment, maintained as the second lien, the sum of fifty dollars and interest, by adding to the Reeve judgment, maintained as the third lien, the sum of fifty dollars and interest from May 19, 1888, and by substituting as the fifth lien the whole amount of the Horner judgment, being thirteen hundred and four dollars and interest from June 3, 1873.

The Statute of Limitations does not run while an action to recover the matter in dispute is pending. The action is pending until final judgment: *Nevitt v. Woodburn*, 160 Ill. 203, 52 Am. St. Rep. 315, 43 N. E. 385; and it is commenced when the summons is served or delivered to the proper officer for service: *Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023; *Montague v. Stelts*, 37 S. C. 200, 34 Am. St. Rep. 736, 15 S. E. 968; note to *Ross v. Luther*, 15 Am. Dec. 344-347. But see *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590, 23 S. E. 428.

When the Equities are Equal the law will prevail: See *Kern v. Hotaling*, 27 Or. 205, 40 Pac. 168, 50 Am. St. Rep. 710, and cases cited in the cross-reference note thereto.

SELOVER v. SELOVER.

[62 N. J. Eq. 761, 45 Atl. 522.]

HUSBAND AND WIFE—Settlement—Presumption.—A conveyance by a husband to his wife, which does not express any trust, raises a legal presumption, in the absence of proof to the contrary, that a settlement upon the wife was intended. (p. 479.)

A HUSBAND MAKING EXPENDITURES in the Improvement of His Wife's separate estate raises a presumption that it was intended as a gift to her, in the absence of proof to the contrary. (p. 479.)

Hawkins & Durand, for the complainant and appellant.

David Harvey, Jr., for the defendant and respondent.

761 GUMMERE, J. This is a bill filed by a wife against her husband to recover the possession of premises at Ocean Grove, which had been conveyed to her by her husband, through a third party, and for an accounting for the use of the same, and is, in its nature, an action of ejectment and for mesne profits, brought in the court of chancery because of the disability of the complainant to maintain an action at law against the defendant, because of their marital relationship. The defendant answered and also filed a cross-bill, alleging that at the time of the transfer of the said premises by him to his wife he was about to embark in a business venture, and it was decided between them that the title should be held by the complainant, and that at her request, and in consideration that she would continue to live with him and the marital relations then existing between them should continue, he conveyed **762** said premises to her; and that it was understood and agreed at the time of said conveyance that said property should be held by her for him, and should continue to be and remain his property.

The complainant, by her answer to the defendant's cross-bill, denies that there was any agreement that the premises were to continue the property of the defendant, and, on the contrary, avers that said property was conveyed to her as a gift, to be her sole and separate property, and that, by said conveyance, she became the absolute owner thereof.

The vice-chancellor, after hearing the proofs, reached the conclusion that the defendant had failed to establish the existence of a resulting trust, or an equitable title, in his favor; that the conveyance to the wife must be considered as a gift to, or a settlement upon, her; and that she was entitled to an accounting

from her husband for the rents of the property from the time of her making demand upon him for them. He further considered that the defendant was entitled to an equitable lien upon the premises for certain moneys which, the proofs showed, he had expended in making improvements thereon, after the conveyance to the complainant, and while the parties were occupying them as husband and wife.

A decree was made upon these lines, and both parties have appealed therefrom; the defendant from the whole decree, and the complainant from that portion thereof which establishes a lien upon the premises in favor of the defendant for the moneys expended by him in improvements.

We concur in the conclusion reached by the vice-chancellor that the defendant has failed to establish a resulting trust, or an equitable title, in his favor in the premises, and that he should account to the complainant for all rents received by him after demand made upon him by her for them. The conveyance to her does not express any trust, and the legal presumption arising from a transaction of this kind, in the absence of proof to the contrary, is that a settlement upon the wife was intended. The proofs in the case confirm rather than overcome the presumption of a settlement. To this extent the decree should be affirmed.

763 The portion of the decree appealed from by the complainant, however, does not seem to be justified by the facts in the case. The same reasons which support the presumption that, by purchasing property and taking title thereto in the name of his wife, a husband intends to make a settlement, apply with equal force to expenditures made by him in the improvement of her separate estate (*Black v. Black*, 30 N. J. Eq. 215; *Lister v. Lister*, 35 N. J. Eq. 49; S. C., on appeal, 37 N. J. Eq. 331); and particularly is this so when the property upon which the expenditures are made has previously been conveyed by the husband to the wife by way of a settlement upon her.

It is true that the presumption that such expenditures are made by way of a gift to the wife may be rebutted by proof that such was not the intention with which they were made, but we find no such proof in the case before us. The improvements were made by the husband, not at the request of the wife, but of his own volition; and, although frequent conversations took place between them, regarding their character and cost, nothing was said at any time by him which suggested the idea that he expected to be reimbursed by the complainant for his outlay; nor was anything said by her to induce such a belief on his part.

The portion of the decree appealed from by the complainant should be reversed.

The Effect of Husband's Expenditure of time or money on his wife's separate estate is considered in the monographic note to *Morris v. Fletcher*, 77 Am. St. Rep. 92-109; *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

Resulting Trusts are considered in the monographic note to *Neill v. Keese*, 51 Am. Dec. 751-760. Consult, also, the recent case of *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235.

MILLER v. WORRALL.

[62 N. J. Eq. 776, 48 Atl. 586.]

WILLS.—The Intention of a Testator is to be collected from all the parts of a will, and it must be clear, or else the heir at law will not be disinherited. (p. 481.)

WILLS—Devise of Property—Where the Words "Personal and Mixed" follow a devise of "all the rest and residue of my property," such words qualify and define the kind of property intended to be disposed of, and do not include a devise of real estate. (p. 482.)

WILLS.—Where a Testator Uses Technical Words in a will, they are to be given a technical meaning. (p. 482.)

WILLS.—The Words "Personal and Mixed" in a will cannot be extended so as to devise real estate. (p. 483.)

DEFINITION.—Mixed Property is that kind of property which is not altogether real, nor personal, but a compound of both. (p. 483.)

WILLS.—If There be Uncertainty as to the Intent of a Testator to devise real estate in his last will, it will not be construed to do so. (p. 484.)

WILLS—Devise of Realty.—There must appear from the words used by a testator a clear intent to devise his real estate, otherwise the heir at law will not be disinherited. (p. 484.)

Bill, first, for directions to the executors of John Jelliff, deceased, as to whether Caroline A. Riggs, one of his children, who died before the life tenant (his widow), took a vested interest in the estate of her father at his death, or would only take it in case she outlived her mother, the life tenant; and second, if she did take such interest at his death, did she devise and bequeath, by her last will, all her interest in both her real and personal estate to Amelia K. Worrall, one of the defendants?

John R. Hardin and Cortland Parker, for the appellants.

Frederick F. Guild, for the respondents.

777 FORT, J. We agree with the conclusions reached by the learned vice-chancellor in the case, in so far as they relate to the construction of the last will of John Jelliff, where he holds that, under said will and codicils thereto annexed, his children living at his death took a vested interest in his estate, and that nothing occurred prior to the death of his daughter, Caroline A. Riggs, by which she was divested of her interest. But in the opinion of the learned vice-chancellor we find no reference to the will of Caroline A. Riggs, or anything to indicate that the peculiar phraseology as to the bequest to Amelia K. Riggs, by the third item thereof, was considered by him.

The decree appealed from contained this clause: 778 "Said Caroline A. Riggs, upon the death of her father, the said John Jelliff, took, and at the time of her death was entitled to, a vested undivided one-sixth equitable interest, as cestui que trust, in all the real and personal estate of the said John Jelliff, subject, in the first place, to the life estate therein of her mother, the said Mary Jelliff, and subject to be divested by the death of the said Caroline A. Riggs leaving issue her surviving in the lifetime of her mother, Mary Jelliff; and that inasmuch as the said Caroline A. Riggs died without leaving issue in the lifetime of her mother, Mary Jelliff, the said undivided one-sixth equitable interest in the said real and personal estate never became divested, but remained the absolute property of the said Caroline A. Riggs, and at her death passed, under her last will and testament, to her personal representatives and devisees."

To sustain so much of the above-quoted clause of the decree appealed from in this case as decrees that, by the will of said Caroline A. Riggs, the real estate of which she died seised passed to her devisees, we must find authority in that will, or otherwise the real estate of which she died seised will descend to her heirs at law, as though she had died intestate.

Lord Mansfield stated the rule to be that the testator's "intention is to be collected from all the parts of the will, and it must be clear, or else the heir at law shall not be disinherited": *Oates v. Cooke*, 3 Burr. 1684; *Stephenson v. Heathcote*, 1 Eden, 43; *Spearing v. Buckner*, 6 Term Rep. 610.

No real estate of which Caroline A. Riggs died seised was devised by her will, unless it can be held to have been so devised by the third item thereof.

The third item of her will reads as follows: "Third. All the rest and residue of my property, personal or mixed, wheresoever situated, which I now own, and any or all accumulation

therefrom, I give, devise and bequeath absolutely to my daughter, Amelia K. Riggs, the youngest child and only daughter of my late husband, George Riggs."

It is clear that this item of her will effectually bequeathed to Amelia K. Worrall (nee Riggs), the defendant, all the personal estate of which she died possessed (except that bequeathed by the ⁷⁷⁹ second item of her will), and included all the interest in the estate of her father, John Jelliff, under his will, which was, at the time of her death, personal property, and that included all the personal property possessed by said Jelliff at his death, and the proceeds of any real estate which had been sold by the executors during the life of Mrs. Riggs. This personality, in the language of the decree of the vice-chancellor, "passed under her last will and testament, to her personal representatives." But did the real estate also pass under this third item of the will?

As we have seen, the rule is that it did not so pass unless it was the clear intent of the testatrix that it should do so. We do not think that such an intent appears; on the contrary, we think that such intent does not appear, but that the words used limit the estate which it was intended should pass, under the third clause of her last will, to her personal estate only.

The language of her will is "all the rest and residue of my property, personal and mixed, wheresoever situate, which I now own, and any or all accumulations therefrom, I give, devise and bequeath," etc. While the testatrix here uses the words "all the rest and residue of my property" and the word "devise," still we think, in view of the use of the words "personal and mixed" immediately following "property," that these words must be held to qualify and define the kind of property intended to be disposed of by the will, and that no broader signification can be given to the words "personal and mixed," as here used, than their well-recognized meaning conveys, and if there be doubt, that doubt must be resolved in favor of the heir as against one who claims as a devisee. The testatrix, in using the words "personal and mixed," is using technical words, and by well-settled rules of construction they must be given their technical meaning.

Mr. Justice Van Syckel, in construing words in a will in a case decided at the present term of this court, uses this language: "In construing wills it must be presumed that words are used in their appropriate technical sense. . . . Otherwise there will be no uniform rule of interpretation and no stable

signification ⁷⁸⁰ given to language which has a definite meaning in law": *Chandler v. Thompson*, 62 N. J. Eq. 728, 48 Atl. 583. Nor will the contention that the words "all the rest and residue of my property," when taken in connection with their limitation by the words "personal and mixed," be deemed to devise realty.

The words "all the remainder of the rents, profits and residue of my estate" were held not to be words which would convey real estate when used in the manner that the testator had employed them: *Den v. Snitcher*, 14 N. J. L. 53.

The words "residue of my estate," though words of sufficient breadth to devise real estate when so intended, will be held to be used in a restricted sense when that intention appears from other words used or direction made in connection with their use in the will: *Birdsall v. Applegate*, 20 N. J. L. 244; *Den v. Snitcher*, 14 N. J. L. 53; *Bullard v. Goffe*, 20 Pick. 252.

The word "property," when used in connection with "property, money and effects," has a restricted import, and does not embrace real estate: *Beach on Wills*, sec. 261; *Brawley v. Collins*, 88 N. C. 605.

The words "personal and mixed" by no construction or recognized legal signification can be extended so as to devise real estate. It will be unnecessary to define "personal."

"Mixed property" is said to be "that which, though falling under the definition of things real, is attended with some of the legal qualities of things personal. Also property which, though falling under the definition of things personal, is attended with some of the legal qualities of things real": *Am. & Eng. Ency. of Law*, 697.

A better definition is as follows: "That kind of property which is not altogether real, nor personal, but a compound of both. Heirlooms, tombstones, monuments in a church, and title deeds to an estate are of this nature": 2 *Bouvier's Law Dictionary*, 190; 1 *Sharswood's Blackstone*, bk. 2, 428.

Real estate does not pass under a bequest "of the rest, residue and remainder of my estate, consisting in ready money, plate, jewels, leases, judgments or in any other thing whatsoever or wheresoever": *Timewell v. Perkins*, 2 Atk. 102.

⁷⁸¹ Where the words "residue of my estate" appear from the context of the will to have been confined to personal property only, they will not be held to extend to real estate: *Cruise's Digest*, tit. "Devise," c. 10, sec. 76.

It is quite material in construing a devise of "all my estate"

by a testator whether he has made previous mention of land of which he was seised in fee: *Cliffe v. Gibbons*, 2 Ld. Raym. 1324.

The clause "all my stock in trade, household goods, wearing apparel, ready money, and every other thing, my property of what nature and kind soever," was held not to pass land, being controlled by indications which render the intent of the testator uncertain: *Doe v. Rout*, 7 Taunt. 79.

The rule deducible from all the cases is that if there be uncertainty as to the intent of the testator to devise the real estate in his last will, it will not be construed to do so; in fact, the rule should be stated in this wise, that there must appear from the words used by the testator a clear intent to devise his real estate, otherwise the heir at law will not be disinherited.

We do not think that by the words "all the rest and residue of my property, personal and mixed, wheresoever situated," etc., used by Caroline A. Riggs in her last will, that there is such freedom from uncertainty as to her intention as to make it clear that she intended to devise her real estate by the third item of her will, but, as to that, we think she died intestate, and that her real estate descended to her heirs at law, and to this extent the decree appealed from should be modified. For this purpose the decree is reversed.

In Construing a Will, technical words therein used will ordinarily be given their technical meaning: See *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30, and cases cited in the cross-reference note thereto. Furthermore, heirs are favorites of the law: *Saylor v. Plaine*, 31 Md. 158, 1 Am. Rep. 34; and the construction of a will should be such as not to disinherit them, unless on so strong a probability that an intention to the contrary cannot reasonably be supposed: *Peckham v. Lego*, 57 Conn. 553, 14 Am. St. Rep. 130, 19 Atl. 392.

ADOUE v. SPENCER.

[62 N. J. Eq. 782, 49 Atl. 10.]

FRAUDULENT CONVEYANCES.—A Creditor Whose Claim has been Allowed by an Administrator may maintain a bill to set aside a fraudulent conveyance of land by the intestate. (p. 486.)

A CONVEYANCE BY A HUSBAND to His Wife as security for an indebtedness due from him to her by reason of moneys from the principal of her separate estate which he had appropriated to his own use must be treated as a mortgage, and his creditors have an equity in such property beyond the amount justly due to the wife. (p. 486.)

CONVEYANCES TO SECURE DEBTS are Mortgages. (p. 487.)

FRAUDULENT CONVEYANCE.—A Wife to Whom Property has been Conveyed by Her Husband is, as against his creditors, entitled to be allowed for all expenses for betterments and taxes which she may have paid, less rents received since the conveyance. (p. 487.)

HUSBAND AND WIFE—Conveyances.—As against the creditors of a husband, the burden rests upon the wife to establish the consideration for a conveyance to her from him. (p. 488.)

FRAUDULENT CONVEYANCE.—Where a Husband Receives and Uses the Principal of His Wife's Separate Estate, to establish the fraudulent character of a conveyance by him to her, as against creditors, the burden is upon the creditors to show that such taking and use was by gift from the wife and not by loan. (p. 488.)

UNDER THE MARRIED WOMEN'S ACTS, Where a Husband Takes the Principal of Property which comes to his wife by gift, devise or descent, he takes it charged with a trust to administer it for his wife. (p. 488.)

WHERE THE PRINCIPAL OF THE SEPARATE PROPERTY of a Married Woman Comes into Her Husband's Possession, the law will not presume that it was a gift to him, and the burden is upon him to establish that it was a gift. (p. 488.)

THE RIGHT OF A HUSBAND to the Sole Management of His Wife's Separate Property, conferred by statute, gives no right to divert such property to his own use. (p. 490.)

EVEN AT COMMON LAW, a Wife in Equity Might Have a Separate Estate over which she had the *jus disponendi* as if she were a *feme sole*. (pp. 490, 491.)

IF IT IS CLEAR that a Husband has Taken the Principal of His Wife's Separate Estate, with or without her consent, but without an express gift or clearly implied intent to give, equity should hold it not a gift. (p. 490.)

GIFTS Between Husband and Wife.—From the Receipt by a Husband of the Income of his wife's separate property, with her consent, a gift may be implied. (p. 492.)

PROPERTY Coming to a Wife by Gift, Devise or Descent is Separate Property. (p. 493.)

WIFE'S SEPARATE PROPERTY.—A Husband may Convey Property to His Wife in Texas in payment of money previously used by him, and thereby make the property so conveyed her separate property. (p. 493.)

SEPARATE PROPERTY.—A Voluntary Conveyance of Community Property by a husband to his wife is good, and makes it her separate property. (p. 493.)

GIFT by Wife to Husband.—The Mere Possession by a Husband of the principal of his wife's separate estate will not imply a gift. (p. 493.)

WITNESSES—Declarations of Decedents.—In a contest to determine the validity of a wife's mortgage on the estate of her deceased husband, the wife cannot testify as to any transaction with or statements by him, since her interest is antagonistic to his estate. (pp. 495, 496.)

Frank Bergen and William T. Austen, for the appellant.

Sherrerd Depue and John Neethe, for the respondents.

783 FORT, J. This was a creditor's bill to set aside a conveyance made by John C. S. Spencer to his wife, passing the title through one Coote. The deed conveyed a one-half interest in property in the city of Elizabeth, in this state. At the time of the conveyance, Spencer and his wife were domiciled at Galveston, Texas. The deeds were both dated September 6, 1896, and the one from Spencer to Coote was acknowledged September 30, 1896, and the one from Coote to Mrs. Spencer January 30, 1897. Both deeds were recorded on February 1, 1897.

Mr. Spencer died in Texas in June, 1897. Letters of administration were taken out there, but his estate was admittedly insolvent at his death. On September 6, 1898, the orphans' court of Union county, in this state, after notice and hearing, granted letters of administration on his estate to Edward Nugent. The complainants in this case presented to the New Jersey administrator a duly verified claim against the estate of said John C. S. Spencer, which, after notice to the counsel of Mrs. Spencer, the widow, and the Texas administrator, and no objection being interposed on her behalf, the same was allowed by the administrator.

The claim was upon a note of Ladd & Company, of twelve thousand dollars, with a collateral note of John C. S. Spencer given therewith. As to the legality of this claim and its rightful allowance we agree with the conclusions reached by the learned vice-chancellor. We also agree with him in his finding that, under the law of this state, a creditor whose claim has been allowed by an administrator is in a position to maintain a creditor's bill to set aside a conveyance **784** of land by the intestate, which it is alleged was conveyed to defraud creditors.

The case cited by the vice-chancellor was determined in this court, and settles the law upon that subject in this state: *Haston v. Castner*, 31 N. J. Eq. 697.

The consideration stated in the conveyance from Spencer and wife to Coote, and from Coote and wife to Mary H. Spencer, was one dollar.

The learned vice-chancellor throughout his opinion seems to have treated these conveyances as deeds, while upon any theory that would allow Mrs. Spencer to sustain the conveyance to her, her deed must be treated as a mortgage. It surely, upon the most favorable view to be taken of the transaction in her behalf, was only security for an alleged indebtedness due from her husband to her arising out of moneys of hers which he had appropriated to his own use or which she had advanced him,

either with or without an express promise to repay, as her evidence and the facts disclosed establish. On this state of facts, even if the transaction were not fraudulent, the creditors would be entitled to an equity in this property, beyond the amount that was justly due to Mrs. Spencer from her husband for money she had advanced and for expenses for betterments and taxes which she may have paid, less rents received since the conveyance to her. That conveyances to secure debts are mortgages is undoubted: *Judge v. Reese*, 34 N. J. Eq. 387; *Melick v. Creamer*, 25 N. J. Eq. 429; *Cake v. Shull*, 45 N. J. Eq. 208, 16 Atl. 434; *Winters v. Earl*, 52 N. J. Eq. 588, 28 Atl. 15.

The decree in this case is that there is due to the complainants from the estate of John C. S. Spencer, deceased, the sum of thirteen thousand two hundred and sixty-eight dollars and sixty cents, which is decreed to be a lien upon the lands in the complainants' bill mentioned, and the deeds in question (above recited) are set aside, annulled and made void as against the said debt of the said complainants, and the defendant is to pay costs.

The one-half interest in the property in question is admittedly of less value than the amount decreed complainants, and therefore the defendant, Mrs. Spencer (the appellant here), takes nothing by the conveyance of her husband to her. That this decree must be reversed and modified to the extent of the taxes or assessments or both, paid upon the property by Mrs. Spencer, ⁷⁸⁵ together with the cost of the betterments placed thereon in excess of rents received, if any, we are all agreed. The case shows that on August 10, 1897, Mrs. Spencer paid for taxes and assessments then upon the property nine hundred and seventeen dollars and two cents. This was paid within two months after her husband's death and within about six months after the conveyance made to her was recorded. The amount of these taxes and assessments was admitted to have been paid by Mrs. Spencer, as appears in the record, and a statement of them was marked "D1," in evidence by consent.

I also think this decree should be reversed for another reason—namely, that there may be an ascertainment, either by the vice-chancellor or by a reference to a master, of the amount of any money or other personal property, or its proceeds other than income thereon, which came to Mrs. Spencer by gift, devise or descent, and which was received by her husband, either from her or from some other person for her account,

and which was taken and used by him. To the extent that he received such funds I think he could, and, indeed, in law and morals should, secure her as he did, by the conveyance of September 6, 1896. Whatever that amount may be should also be decreed to be a prior lien to that of the complainants.

I agree with the learned vice-chancellor that the burden is on Mrs. Spencer to establish the consideration for the conveyance to her, and that it is only good as a security to her for the amount which she can establish was received by her husband from her, or others for her, from the principal of her separate estate, and which had come to her by gift, devise or descent, as aforesaid; but I do not agree with him in his opinion where he seems to indicate, if not directly hold, that the burden is on Mrs. Spencer to also show that the funds which thus came to her husband's hands were not given to him by her, but were a loan, for which he had agreed to repay or secure her. My reasons for this last position are twofold: 1. That by the terms of the married women's act of the state of Texas, when a husband takes the principal of property which comes to his wife by gift, devise or descent, he takes it charged with a trust to administer it for the wife, and that to establish the taking in any other manner and a nonliability to ⁷⁸⁶ account therefor to her, he or those claiming against her must show an express agreement by her to that effect; and 2. That the principal of the separate property of a married woman coming into the hands of her husband from her, or others acting for her, after the passage of a married women's act, where its terms are as broad as the Texas act or our own, is to be treated as if she were a *feme sole* at the time of its delivery to him, and the law will not presume that such money thus taken by the husband from her, with or without her consent, was a gift to him, and the burden is upon him to establish that it was a gift, and is governed by the same legal rules of liability as if received from a stranger.

The Texas statute applicable to this case is as follows: "Art. 2967. All property, both real and personal, of the husband, owned or claimed by him before marriage, that acquired afterward, by gift, devise or descent, as also the increase of all lands thus acquired, shall be his separate property. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward, by gift, devise or descent, as also the increase of all lands thus acquired, shall be the separate property of the wife, but during the marriage

the husband shall have the sole management of all such property.

"Art. 2968. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, shall be deemed the common property of husband and wife, and during the coverture may be disposed of by the husband only."

This is a very comprehensive statute, and the last clause in article 2967, "but during the marriage the husband shall have the sole management of all such property," is particularly forceful upon the question here at issue.

The statute expressly says all the property belonging to the wife before marriage and that acquired after "by gift, devise or descent" shall be her separate property, and the statute, by giving the husband during marriage the right to the sole management thereof, impresses upon all such property a trust to manage it for the wife, and the imposition of the duty to manage excludes a presumption of title passing or the property vesting in the husband or merging in his estate. When he takes property under that statute he takes it to manage, not as his own. By the statute the wife's consent is immaterial. She cannot prevent his taking ⁷⁸⁷ it if she were to so desire, and when he thus takes he takes just the rights the statute gives and no more. At his death his executors must account for his stewardship. If he has lost or misappropriated any of the property so taken he may secure the wife therefor out of any funds or property he may possess. Nor does article 2968, as to the common property of the husband and wife, above quoted, change the effect of article 2967, because property coming to the wife during marriage by "gift, devise or descent" is expressly excepted out of the common property.

The conferring by statute or by private contract upon another of the "sole management of all such property" could by no known method of construction, as it seems to me, be converted into a right to divert to one's own use. The statute fixes the husband's obligation to account for all funds which came to his hands to manage as a sacred trust—all the more sacred because of the confidence of the marital relation.

The authorities which will sustain the second proposition above stated will apply with equal force to the first, and I shall proceed to consider the second before citing them.

The statutes now existing in the several states as to the property of married women have entirely overthrown the common-

law rule of the merger of the wife's entity and estate, upon marriage, in the husband. It is no longer necessary to hold that because a husband takes his wife's property into his possession that she is remediless. Nor is it necessary, under the Texas act, above quoted, that she take from her husband a promissory note or some other acknowledgment that the handing him the money was not a gift. There seems no reason in common sense that when a husband takes of the principal of his wife's estate into his possession that he should be presumed to acquire it as his own unless she has exacted some evidence in writing, or an express agreement by him, otherwise. There are many reasons why the rule should be the reverse of this, and that such a taking should be deemed a loan to him unless he prove otherwise. In equity, surely no other rule should obtain. Even at common law a wife in equity might have a separate estate over which she ⁷⁸⁸ had the *jus disponendi* as if she were a *feme sole*: *Caton v. Rideout*, 1 Macn. & G. 599; *Jones v. Clifton*, 101 U. S. 225.

If it is clear that a husband has taken the principal of his wife's separate estate, with or without her consent, but without an express gift or clearly implied intent to give, equity should hold it not a gift, but to be treated in the same manner as the money or property of any other person, taken by the husband under like circumstances, would be treated.

The true principle is stated by Mr. Justice Field, of the United States supreme court, in speaking for that court, as follows: "We are of opinion that . . . there would be no presumption, since the passage of the married women's act, that she intended to give to her husband the moneys she placed in his hand any more than a gift would be inferred from a third person, who, in like manner, deposited money with him. . . . We think that whenever a husband acquires possession of the separate property of his wife, whether with or without her consent, he must be deemed to hold it in trust for her benefit in the absence of any direct evidence that she intended to make a gift of it to him": *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. Rep. 677.

The married women's act of the District of Columbia, upon which this decision was founded, is very similar to that of our own state, and not as clear and full as that of Texas.

The supreme court of Pennsylvania has stated the proposition in some of its phases even more strongly than the United States supreme court. It says (Mr. Justice Strong): "When

the act of assembly declares, as it does, that all property, real, personal and mixed, which shall accrue to any married woman during coverture by will, descent, deed of conveyance or otherwise shall be owned, used and enjoyed by such married woman as her own separate property; when the leading purpose of the act is to protect the wife's estate by excluding the husband, it is impossible for us to declare that mere possession of it by the husband is proof that the title has passed from the wife to him. After it has been shown, as it was in this case, that the property accrued to the wife by descent from her father's brother's estate, the presumption necessarily is that it continued hers. In such a case it lies upon one who asserts it to be the property of the husband ⁷⁸⁹ to prove a transmission of the title, either by gift or contract for value, for the law does not transmit it without the act of the parties. If mere possession were sufficient evidence of a gift, the act of 1848 would be useless to the wife. Nothing is more easy than for the husband to obtain possession, even against the consent of the wife; and when he obtains it with her consent, it can be at most but a slight evidence of a gift."

This case has since been followed in *Bergey's Appeal*, 60 Pa. St. 408, 100 Am. Dec. 578.

In passing upon a like case, the supreme court of Michigan says: "The usual rule is that if one gives another money at his request, the law will imply a promise to repay, and we see no injustice in applying the rule against a husband where there are no circumstances tending to show a different understanding between the parties. This court has frequently held that the presumption of the law is against a gift by the wife to the husband, and the burden of proving it is upon him": *Sykes v. City Sav. Bank*, 115 Mich. 321, 69 Am. St. Rep. 562, 73 N. W. 369.

The facts in the Michigan case were more strongly in the favor of the husband's creditors than here. In that case the wife testified that she saw her husband was failing in business right along and losing money, and she told him she wanted her money back, and he gave it to her. He gave her three thousand dollars in cash, and the wife at once deposited the three thousand dollars in the City Savings Bank in her own name. It also appeared that there was no express promise to repay the wife, and it further appeared that a part of the money she had let her husband have was from the rents of a house that her husband had given her. She claimed she had given

the husband the money from time to time to use without any promise to return it whatever, and yet, as against the creditors of a husband who thus gave his wife this money to secure her, the court held that the husband could lawfully prefer her, and repay her the money he had received from her, without any promise to repay the same at the time of the advancing thereof.

In the same state, in another case, it was said: "Something other than use and possession by him [the husband] permitted by her [the wife] must be shown to establish a gift": *White v. Zane*, 10 Mich. 333.

⁷⁹⁰ The Tennessee chancery appeal court has lately held: "A husband having received money from his wife's general estate may, in consideration thereof, create an indebtedness to her by agreeing to repay her, and may subsequently pay her by conveying property to her to the exclusion of his other creditors": *Sanford v. Allen*, 42 S. W. 183.

The supreme court of Kentucky, in a case where the husband was insolvent, and when so conveyed to his wife real estate as security for money of hers he had used, says: "While such conveyance was in payment of a debt which the grantor could not be compelled to pay, it is not strictly a voluntary conveyance, the grantee having an equity. She had a meritorious claim against her husband that, in equity and good conscience, he should repay her, although, of course, he could not be compelled to do so": *Poynter v. Mallory*, 20 Ky. Law Rep. 284, 45 S. W. 1042.

The Missouri supreme court holds that where a husband had reduced his wife's personal property to possession before the passage of the married women's act of 1875, as he had the legal right to do, that after the passage of that act the fact that he had done so would, to the extent he had so done, furnish a sufficient consideration for a valid deed of gift of land to the wife to make restitution of funds so taken: *Scrutchfield v. Sauter*, 119 Mo. 615, 24 S. W. 137.

The supreme court of Pennsylvania, in *Hauer's Estate*, 140 Pa. St. 420, 425, 23 Am. St. Rep. 245, 21 Atl. 445, 446, clearly states the rule here elucidated, and the distinction between the presumption as to a gift by the wife of her separate estate as between principal and income used by her husband as follows: "But a broad and plain distinction is drawn by the cases between the receipt by the husband of the income of his wife's separate property and the receipt by him of the principal or corpus

of her estate. A gift of the income may be implied from his receipt of it with her consent, but a gift of the principal will not be presumed from her mere acquiescence in his receipt and use of it."

That the property received by Mrs. Spencer was her separate property, under the Texas statute, is established by the decisions of that state. Property received by the wife by donation is separate property: *Fish v. Flores*, 43 Tex. 344. ⁷⁹¹ Property coming to the wife by gift, devise or descent is separate property: *Herschell v. Blum*, 2 Posey (Tex.), 265; *Ezell v. Dodson*, 60 Tex. 331.

A husband may convey property to his wife in Texas in payment of money previously used by him, and thereby make the property so conveyed her separate property: *Ross v. Kornrumpf*, 64 Tex. 394. Even a voluntary conveyance by a husband to his wife of community property is good, and makes it her separate property: *Lewis v. Simon*, 72 Tex. 475, 10 S. W. 554; *Hall v. Hall*, 52 Tex. 299, 36 Am. Rep. 725.

A husband may not sell his wife's personal property which comes to his hands to manage: *Kempner v. Comer*, 73 Tex. 196, 201, 11 S. W. 194.

It will answer no useful purpose to further extend this opinion by reference to other authorities. Since 1848, which was about the year of the beginning of the statutory creation of the wife's separate property rights, the trend of the decisions in all the states has been toward the rule here contended for. It can safely be said that with scarcely an exception the supreme court of the United States and the courts of last resort of all the states have held that as to the principal of the wife's separate estate, taken into the possession of a husband and used by him, he or his personal representative is bound to account to her, and that to sustain a refusal to so do, or to relieve from equitable liability to so do, the burden is on him to establish that he received such property as a gift from her. His mere possession of it will not imply such a gift any more than it would from a like receipt from any other person. There appears no good reason either in law or morals why such should not be the rule. Under the Texas statute above cited, such a taking clearly can raise no presumption of a gift, for the statute expressly declares that it shall be a taking to manage; that it was taken by the husband in any other way he must prove by the preponderance of evidence in the cause, and equity under such a statute should guard the wife's right scrupulously.

To the extent that the principal of the separate statutory estate of the defendant in this case, which came to her by gift, devise or descent, was taken and used by her husband, we hold ⁷⁹² that she is entitled to a lien, by way of security therefor, upon the property described in complainants' bill, there being no proof in the case that as to such property she intended the same to be a gift to her husband when he took it, and therefore the legal presumption, under the Texas statute, is that he came into the possession thereof only to manage it. What amount of the forty-one thousand three hundred and ninety-one dollars and two cents set up in the defendant's answer or established by the proofs in the cause came to the defendant by gift, devise or descent under the statute, and was of the principal of her separate estate, thus acquired, will have to be determined by the chancellor or upon reference to a vice-chancellor or a master. The decree for this reason also is reversed that such ascertainment may be had.

From the fact that both the complainants and the defendant were domiciled in Texas, the married women's acts and the decisions thereon of that and other states have been largely referred to, but it is not intended thereby to imply that the rule in this state is not the same. The legal rules governing the rights of a wife against her husband or his personal representatives, as to the principal of her statutory separate estate taken and used by him, is not different in this state from that shown to be the rule in other states. Mr. Justice Magie, speaking for this court, in *Cole v. Lee*, 45 N. J. Eq. 779, 785, 18 Atl. 854, 856, says: "It is well settled that, on proof that a husband has received his wife's money, a court of equity will compel him and his representatives to account to her at least for the principal received, and they can only discharge themselves by showing that the husband disposed of the money according to the wife's directions, or that it was a gift to him. . . . Such liability to account for the wife's money would afford a consideration sufficient to support a mortgage made by the husband to a third person for the purpose of being transferred to the wife for her security."

In the case just cited the facts were that in 1855 the wife received sixteen hundred dollars as her share of her father's estate, and in 1865 about the same amount from the same source, and on each occasion she let her husband take fifteen hundred dollars of this money. On this point Mr. Justice Magie says: "I conclude that the ⁷⁹³ evidence proves that

Mulford Cole [the husband] received three thousand dollars of his wife's money at the times named."

The mortgage was given to her some years after her husband took the money, and creditors whose claims existed at the time the mortgage was made filed the bill in the case to set aside the mortgage as tending to delay and hinder them. If the consideration of the mortgage was not good, it was void as against creditors. There was no pretense that, at the time the money was handed to the husband, there was any note, memoranda or other acknowledgment given to the wife that it was a loan, and the court says: "Their case [the creditors] in this respect can only stand on the ground that the mere fact that Mulford Cole obtained this money from his wife raises a presumption that she gave it to him, which presumption will prevail unless she overcomes it by proof that the transaction was a loan. Such a presumption does not arise in favor of a husband or his representatives, at least as to the principal of his wife's money. . . . But when the fact is established beyond dispute of the reception by the husband of the wife's money, creditors can occupy no better position in the contest than the husband or his representatives."

Strenuous objection was made in this case against the admission of the evidence of the defendant, Mrs. Spencer, as to the statements by her husband to her as to this transaction. The vice-chancellor refers to this matter in his conclusions in the following language: "She [Mrs. Spencer] went into an elaborate statement of conversations between her and her husband as to his being indebted to her for these advances for their living, and her urging him to convey the Elizabeth property on account of it, and of promises on his part to do so. Seasonable objection was made to her testimony in this respect, and elaborate argument was had as to its competency. For the present purposes I shall consider it as competent and deal with it as such."

It is quite apparent that the learned vice-chancellor doubted its admissibility, but holding the view he did upon the law and facts upon the other branches of the case, deemed it unnecessary ⁷⁹⁴ to decide it, but in view of the fact that the case is to be reversed on other grounds, that it may be reconsidered to determine the amount for which the deed to Mrs. Spencer may be held by her as security for her advances, the question of the legality of her evidence is quite material.

We think that as to statements by or transactions with the deceased, she was not a competent witness.

This suit was to charge the property of her deceased husband, on which she held a mortgage, with the debt of the complainants. The extent of the husband's interest depended upon whether her mortgage was or was not valid, and for what amount valid. The bill in this case was filed by a creditor, and the administrator of the deceased husband was a party. The estate of the deceased being insolvent, and the allegation being that this property here sought to be charged was liable for his debts, made the administrator a proper, and, it seems to us, a necessary party. The bill in this case does not state that it is filed by the complainants for themselves and other creditors, but still such is its effect, and if there be any equity in this property, all creditors can come in at the foot of the decree and claim their rights to distribution through the administrator, who would undoubtedly take any surplus proceeds of the sale of this property, and the whole proceeds should be decreed to be paid to the administrator for pro rata distribution to creditors who may prove their claims. The deed to Mrs. Spencer states one dollar as its consideration; that is merely nominal, and in proving her claim under it, treating it as a mortgage, she stands as a party to an action against the representative of her deceased husband, and is prohibited by our statute from testifying as to any transaction with or statement by him: Pub. Laws 1900, p. 363, sec. 4.

In construing this statute, this court has said: "It is apparent that the object of the legislature is to be primarily regarded, and that the object is to close the mouth of a party whose interest is antagonistic to the estate of a deceased person, in regard to those transactions in which the deceased bore a part, and concerning which he, if living, would be the most important, perhaps the only, witness beside the opposing party": *Smith v. Burnet*, 35 N. J. Eq. 314, 322.

⁷⁹⁵ To adopt the language of Mr. Justice Dixon in the case of *Dickerson v. Payne*, 66 N. J. L. 35, 48 Atl. 529, in an opinion filed at the present term of the supreme court, "manifestly, in the transactions to which this plaintiff testified, the deceased bore a part. . . . and, if living, would be the most important, perhaps the only, witness against her. He must have been present when many of her acts, if she testified truly, were performed, and as to those matters, if she testified falsely, he could, as a witness, have directly contradicted her. These are the conditions in which the legislature did not intend to

legalize the testimony of a party against an adversary representing a testator or intestate."

We therefore think the testimony of Mrs. Spencer, in so far as it related to statements by or transactions with the deceased, should be excluded from the evidence in this cause, because inadmissible for any purpose.

ATTACKS BY CREDITORS ON CONVEYANCES MADE BY HUSBANDS TO WIVES.

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I. Introduction.

Conveyances from husbands to wives have been the subject of numerous and frequent attacks by both pre-existing and subsequent creditors, so that the litigation upon this question has been enormous. It has been found difficult to some extent to find a classification which, while being logical and convenient, would at the same time not result in a duplication of authorities and discussion. For this reason, it will be found that some points treated under one head might legitimately have been treated elsewhere. But with the full index given, all the points discussed can be readily found.

II. Relation of Husband and Wife as Element of Fraud.

The mere existence of the relation of husband and wife between the grantor and grantee in a deed does not in and of itself create a prima facie presumption of fraud against creditors: *Droop v. Ride-nour*, 11 App. Cas. (D. C.) 224; *Gottlieb v. Thatcher*, 151 U. S. 271, 14 Sup. Ct. Rep. 319; in the absence of any other evidence. Especially where one fails to show that he was a creditor at the time of the conveyance, or that the husband was insolvent: *Allee v. Slane*, 26 App. Div. 455, 50 N. Y. Supp. 55. Certainly a conveyance is never conclusively fraudulent merely because it is made by a debtor to his wife: *Teller v. Bishop*, 8 Minn. 226. And if the conveyance is on a sufficient consideration, the existence of the relationship will not invalidate the transaction: *Grant v. Ward*, 64 Me. 239; *Wanser v. Lucas*, 44 Neb. 759, 62 N. W. 1108; *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3. So in transactions between a husband and wife in relation to her separate estate, the same principles of law apply as are applicable to dealings between strangers: *Lipscomb v. Lyon*, 19 Neb. 511, 27 N. W. 731; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926. Thus, an honest judgment given by a husband to his wife to secure her separate estate is valid, and where no fraud is alleged, the existence of a marriage will not even be inquired into: *Williams' Appeal*, 47 Pa. St. 307. And a wife is not required to take any writing showing a loan to her husband

of her separate property, nor to notify creditors that she has transacted business with her husband in relation to her separate estate: *Buhl v. Peck*, 70 Mich. 44, 37 N. W. 876.

The existence of the relation of husband and wife is, however, an important fact to be taken into consideration in weighing the evidence relating to the good faith of a conveyance: *McTeers v. Perkins*, 106 Ala. 411, 17 South. 547. The mere existence of the relationship stamps the transaction as one which should be closely scrutinized: *Kelly v. Simmons*, 73 Ga. 716; *Robinson v. Clark*, 76 Me. 493; *First Nat. Bank v. Bartlett*, 8 Neb. 319, 1 N. W. 199; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926; *Hoxie v. Price*, 31 Wis. 82; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606; *Kaufman v. Whitney*, 50 Miss. 103.

And this because husband and wife have unusual facilities for the perpetration of fraud upon creditors: *Robinson v. Clark*, 76 Me. 493; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926. But the mere suspicion which may arise from the relation is not of itself sufficient to render a conveyance fraudulent: *Steel v. De May*, 102 Mich. 274, 60 N. W. 684. The existence of the relation is an important circumstance to take into consideration upon the issue of fraud: *Sherman v. Hogland*, 73 Ind. 472. And a conveyance from husband to wife requires less proof to show fraud, and when a *prima facie* case is made, stronger proof to show fair dealing, than would be required if the transaction were between strangers: *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451. So clearer and fuller proof of an adequate consideration is required than in dealings between strangers: *Claffin v. Ambrose*, 37 Fla. 78, 19 South. 628.

If a conveyance of a considerable portion of property from husband to wife is made when the husband is in failing circumstances, it may, if unexplained, raise a presumption of fraud: *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926; *Kirkpatrick v. Finney*, 30 La. Ann. 223; *Stivers v. Horne*, 62 Mo. 473. So, if a conveyance must prevent creditors from realizing their claims against a husband, it is presumed to be fraudulent: *Glass v. Zutavern*, 43 Neb. 334, 47 Am. St. Rep. 763, 61 N. W. 579; *Hunters v. Waite*, 3 Gratt. 26; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, 2 S. E. 780. It is presumed that property conveyed to a wife was paid for by the husband: *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, 2 S. E. 780. So a lease procured by a husband as agent for his wife is presumed to have been secured with the husband's property: *Yates v. Law*, 86 Va. 117, 9 S. E. 508.

Where fraud is charged in a conveyance from husband to wife, its good faith must be clearly established: *Skellie v. James*, 81 Ga. 419, 8 S. E. 607. And clear and satisfactory proof of a wife's claim against her husband is exacted in a degree not required of others: *Lahr's Appeal*, 90 Pa. St. 507; *Earl v. Champion*, 65 Pa. St. 191.

III. Indebtedness of Husband as Element of Fraud.

a. Effect on Conveyance to Wife.—A husband not in debt may usually make a valid conveyance to his wife: *Haskell v. Bakewell*, 10 B. Mon. 206; *Gilligan v. Lord*, 51 Conn. 562; *Owen v. Owen*, 5 Humph. 352; since there are no creditors whose rights will be affected thereby: *Bridgford v. Riddell*, 55 Ill. 261. So a postnuptial settlement is valid if made when the husband is free from debt: *Clayton v. Brown*, 30 Ga. 490; and is not made with a fraudulent intent: *Larkin v. McMullin*, 49 Pa. St. 29.

Mere indebtedness at the time a conveyance is made from husband to wife does not necessarily make such conveyance void. Prior indebtedness is only presumptive and not conclusive proof of fraud: *Wickes v. Clarke*, 3 Edw. Ch. 58; *Lloyd v. Fulton*, 91 U. S. 479. Even a voluntary settlement upon a wife will be valid, where the husband was not insolvent and the settlement did not impair the rights of creditors: *Patrick v. Patrick*, 77 Ill. 555. A conveyance is not rendered fraudulent merely because the husband was indebted at the time: *Kelly's Appeal*, 77 Pa. St. 232. Especially if the debts are trifling compared with his property: *Beach v. White*, Walk. Ch. 495; *Perkins v. Perkins*, 1 Tenn. Ch. 537. Indebtedness, or even insolvency, is no obstacle to a transfer in good faith for a debt due the wife: *Lehman v. Levy*, 30 La. Ann. 745.

Evidence of indebtedness at the time a conveyance is made is important, however, upon the question of whether such conveyance was fraudulent or not: *Frank v. Kessler*, 30 Ind. 8. And a voluntary conveyance by a husband to his wife while he is in debt is prima facie fraudulent as to creditors: *French v. Holmes*, 67 Me. 186. Creditors have a right to object to a gift by a husband to his wife while he is in debt: *Lounsbury v. Depew*, 28 Barb. 44. Originally, a voluntary postnuptial settlement could be avoided if the husband was in debt at all, a voluntary conveyance by one indebted at the time being deemed fraudulent as a matter of law: *Cole v. Taylor*, 65 N. Y. 78. But the rule generally recognized now is that such a settlement will be upheld if it is reasonable, not disproportionate to the husband's means, and clear of any intent, actual or constructive, to defraud creditors: *Kehr v. Smith*, 20 Wall. 31. Hence, in this case it was held that a voluntary settlement was void where the husband was heavily in debt. And see the following cases, where a voluntary settlement or conveyance has been held void as to creditors, being made when the husband was in debt: *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Fink v. Denny*, 75 Va. 663; *Leich v. Dee*, 86 Iowa, 709, 47 N. W. 881, 52 N. W. 209. A voluntary conveyance when a husband is heavily in debt is presumptive evidence of fraud, but this may be rebutted: *Moritz v. Hoffman*, 35 Ill. 553. But the mere fact that one is solvent will not render a voluntary settlement on his wife good as against existing creditors: *Boyle v. Boyle*, 6 Mo. App. 594. And where a husband procured a voluntary conveyance to be made to his wife, when he

was out of debt, a portion only of the price therefor being paid, creditors who become such before later payments are made, can subject the land to the payment of their claims to the extent of the sums thus diverted from the payment of his debts: *Rose v. Brown*, 11 W. Va. 122.

b. Effect as to Subsequent Creditors.—Even voluntary conveyances made by a husband to his wife when he is free from debt cannot be questioned by subsequent creditors: *Phillips v. Wooster*, 36 N. Y. 412. Even if the husband is in debt, or insolvent, this raises no presumption that the transfer was fraudulent as against a subsequent creditor with notice: *Gentry v. Lanneau*, 54 S. C. 514, 32 S. E. 523; at least if the husband honestly believed he had means with which to pay his debts. But if the prior indebtedness is so great as to be sufficient to raise a reasonable inference of a fraudulent intent, then subsequent creditors may attack the conveyance. Such seems to be a dictum of Chancellor Kent in *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520.

c. Provision for Payment of Husband's Debts.—Settlements for the benefit of a wife have been upheld where the settlement itself provided for the payment of all existing debts, and such debts are actually paid in pursuance of the settlement: *Dygert v. Remerschneider*, 39 Barb. 417, affirmed in 32 N. Y. 629. The agreement to pay existing debts negatives all ground for assuming that any intentional fraud existed in the transaction: *Hester v. Wilkinson*, 6 Humph. 215, 44 Am. Dec. 303. But a husband cannot take his wife's bare promise to pay some of his creditors as a cover for a fraudulent conveyance to her: *Sloan v. Huntington*, 8 App. Div. 93, 40 N. Y. Supp. 393.

d. Sufficiency of Property Retained by Husband.—A conveyance to one's wife is not in fraud of the rights of creditors, where the husband retains ample property for the satisfaction of all his debts, and there is no intent to defraud: *Lang v. Williams*, 166 Mo. 1, 65 S. W. 1012; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561. So, where a debtor retains property greater in value than two and a half times the amount of his debts, a conveyance will be upheld, where it is otherwise free from fraud: *Lloyd v. Fulton*, 91 U. S. 479. See, also, *Guy v. Craighead*, 40 App. Div. 260, 57 N. Y. Supp. 1070, where sufficient property was retained by a husband to pay his debts. A husband can make a voluntary settlement on his wife and children without any consideration, if he has ample property left to satisfy all the just claims of his creditors: *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Guy v. Craighead*, 40 App. Div. 260, 57 N. Y. Supp. 1070; and from these cases it seems that the intent of the husband under such circumstances would be immaterial.

Whether the indebtedness of a husband is sufficient in amount to afford reasonable evidence of a fraudulent intent is determined by comparing it with the amount of property he had at that time: *Wilbur v. Fradenburgh*, 52 Barb. 474. The true test of solvency

is the value of his other property at the time he makes a conveyance to his wife: *Ayers v. Harrell*, 111 Ga. 864, 36 S. E. 946. Where a conveyance to a wife is made in payment of an indebtedness, the fact that the value of the property is largely in excess of the debt is immaterial if the husband has sufficient other property to pay all his debts: *Aultman etc. Co. v. Syme*, 23 App. Div. 344, 48 N. Y. Supp. 231. But the property retained must more than nominally equal or exceed his indebtedness: *Patterson v. McKinney*, 97 Ill. 41.

A conveyance for the benefit of a wife, even if voluntary, is on a meritorious consideration and is not per se fraudulent as to creditors, and will not be declared fraudulent where the husband was not at the time indebted beyond his probable means of payment after making the conveyance: *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439, 52 N. E. 544.

IV. Insolvency as Element of Fraud.

a. **Effect on Conveyance to Wife.**—A voluntary deed from a husband to his wife, made in good faith when he is entirely solvent, is valid: *Lytle v. Black*, 107 Ga. 386, 33 S. E. 414; *Wilbur v. Fradenburgh*, 52 Barb. 474; *Shephard v. Pratt*, 32 Iowa, 296; *Warner v. Dove*, 33 Md. 579; for a conveyance cannot operate to defraud creditors if the debtor retains ample property with which to pay them: *Cours v. Hanna*, 34 Iowa, 597; *Nichols v. Wallace*, 31 Ill. App. 408; *Taylor v. Eatman*, 92 N. C. 601. The question may, therefore, be of vital importance whether a husband was solvent or not at the time he makes a voluntary conveyance to his wife. And if it is shown that he was solvent at the time a gift was made, and had ample means readily and conveniently accessible to his creditors, a gift to his wife will be sustained: *Dixon v. Sanderson*, 72 Tex. 359, 13 Am. St. Rep. 801, 10 S. W. 535; *Reich v. Reich*, 26 Minn. 97, 1 N. W. 804; *Trester v. Pike*, 43 Neb. 779, 62 N. W. 211; *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156. Indeed, the real inquiry as to a fraudulent conveyance, especially as against subsequent creditors, is not whether the husband was indebted, but whether he had ample and abundant means to satisfy all his debts after the conveyance: *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148. Hence, the rule is firmly established that a gift from a husband to his wife is not void as to his creditors, if he retains ample means to pay his debts: *Chambers v. Sallie*, 29 Ark. 407; *Morgan v. Hecker*, 74 Cal. 540, 16 Pac. 317; *Moritz v. Hoffman*, 35 Ill. 553; *Bittinger v. Kasten*, 111 Ill. 260; *Brookbank v. Kennard*, 41 Ind. 339; *Walsh v. Ketchum*, 84 Mo. 427. On the other hand, if he is insolvent at the time of making the conveyance, or if by reason thereof, he is rendered unable to pay his existing debts, the wife's title will be deemed fraudulent: *Gwynn v. Butler*, 17 Colo. 114, 28 Pac. 466; *Booker v. Worrill*, 37 Ga. 235; *Klosterman v. Harrington*,

11 Wash. 138, 39 Pac. 376. A conveyance which denudes a husband of all or the greater part of his property is more than a reasonable provision for his wife, and his probable necessities, as well as his debts, are to be considered: *Ammon's Appeal*, 63 Pa. St. 284. An insolvent husband cannot purchase property for his wife so that she may hold it as against his creditors: *Edmonson v. Meacham*, 50 Miss. 34. And even if he is not insolvent, if he is largely in debt and embarrassed, and his solvency is dependent in a great degree upon the skillful management of embarrassed mercantile operations, a gift to his wife will be fraudulent and void as against existing creditors: *Bertrand v. Elder*, 23 Ark. 494. So a deed in contemplation of insolvency made to aid a former secret conveyance never recorded is invalid: *Talcott v. Levy*, 29 Abb. N. C. 3, 20 N. Y. Supp. 440.

b. Effect as to Subsequent Creditors.—A gift from a husband to his wife while he is solvent is usually good as against subsequent creditors: *Cort v. Skillin*, 29 N. J. Eq. 70; *State v. Wallace*, 67 Iowa, 77, 24 N. W. 609; *Pike v. Miles*, 23 Wis. 164, 99 Am. Dec. 148; *Spicer v. Ayers*, 53 How. Pr. 405; *Weld v. Reilly*, 16 Jones & S. 531. Especially where the gift is not made in contemplation of insolvency or in contemplation of future indebtedness: *Spicer v. Ayers*, 53 How. Pr. 405; *Cort v. Skillere*, 29 N. J. Eq. 70. But a voluntary conveyance will be declared fraudulent as against subsequent creditors where the deed is kept secret and not recorded, and the husband continues in the possession and apparent ownership of the premises. The fraud, in such a case, consists in the design to obtain credit by means of apparent ownership after attempting to place the title beyond the reach of creditors: *Talcott v. Levy*, 29 Abb. N. C. 3, 20 N. Y. Supp. 440.

c. Effect of Subsequent Insolvency.—Where a husband is perfectly solvent at the time a conveyance is made to his wife, with ample property to pay all his debts, the fact that long subsequent thereto he becomes insolvent, by reason of extraordinary and unforeseen misfortune, will not render the conveyance invalid, so that it may be set aside for the benefit of creditors: *Wiswell v. Jarvis*, 9 Fed. 84; *Walsh v. Ketchum*, 84 Mo. 427. Neither is such a conveyance void as to subsequent creditors: *Rankin v. Gardner* (N. J.), 34 Atl. 935. If the agreement between husband and wife is made in good faith and valid at that time, it does not become fraudulent by reason of the fact that the husband subsequently became involved in debt, and was insolvent: *Hill v. Fouse*, 32 Neb. 637, 49 N. W. 760. And if a conveyance is valid when made, and the husband retains ample property to pay all his debts, the fact that afterward, from causes not anticipated, the value of such property retained so depreciates that he becomes insolvent, will not render the conveyance void as against either existing or subsequent creditors: *Payne v. Freer*, 51 Hun, 638, 4 N. Y. Supp. 644.

d. **When Insolvency Immaterial.**—At a later time we shall notice more particularly the occasions when a husband, though insolvent, may make a valid conveyance to his wife. Such a case exists generally when the husband conveys in payment of a valid pre-existing debt, and also when he conveys property exempt from execution. In these cases the question of solvency or insolvency of the husband is immaterial. In Louisiana it is held that the insolvency of the husband will not prevent a conveyance of property by him to his wife for the purpose of replacing her dotal and paraphernal effects, alienated during marriage: *Judice v. Neda*, 8 La. Ann. 484; *Levi v. Morgan*, 33 La. Ann. 532.

V. Intent of Husband to Defraud Creditors.

a. **Generally.**—To render a conveyance from husband to wife fraudulent and void as to creditors, there should exist an intent on the part of the husband to defraud, or at least to hinder and delay, his creditors. If it is made with actual fraudulent intent, participated in by the wife, the conveyance will be void without question: *Thompson v. Feagin*, 60 Ga. 82. It is unnecessary, however, that an actual fraudulent intent should exist on the part of the husband. Such intent may be, and generally is, inferred from the circumstances surrounding the conveyance. As we shall see under "Voluntary Conveyances," such a conveyance will usually raise a presumption that it was made with a fraudulent intent, irrespective of what the actual intent may be. Hence, a voluntary conveyance, made by a person heavily indebted, and of such a portion of his property that it must necessarily operate to delay or defeat his existing creditors, is presumed fraudulent, for he is held to intend the fraud his act necessarily produces: *Churchill v. Wells*, 7 Cold. 364. The intent may be gathered from the surrounding circumstances. So where lands are conveyed without consideration about the time debts were contracted, and no sufficient explanation of the transfer is made, the conveyance will be deemed fraudulent as to such creditors: *Clarke v. McGeihan*, 25 N. J. Eq. 423. It is but seldom that positive and direct proof of fraud can be given, and in almost every instance it is to be inferred from circumstances, including the acts and conduct of the parties: *Zimmerman v. Heinrichs*, 43 Iowa, 260. But the fact that a husband is embarrassed by debt does not establish any fraudulent intent on his part, if at the time he was honestly indebted to his wife and made the conveyance for the purpose of securing her: *Nadal v. Britton*, 112 N. C. 180, 16 S. E. 914. In California it is entirely a question of fact whether a conveyance from husband to wife is made with a fraudulent intent, and there are no conditions under which the law will pronounce a gift fraudulent and void as a matter of law: *Bull v. Bray*, 89 Cal. 286, 26 Pac. 873; *Knox v. Moses*, 104 Cal. 502, 38 Pac. 318. But the fact that one conveys a large portion of his property, without consideration, to his wife, knowing at the time that

his debts cannot be paid without recourse to such property, tends strongly to prove that the conveyance was made with intent to defraud creditors: *Threlkel v. Scott* (Cal.), 34 Pac. 851.

b. Conveyance Pending Legal Proceedings.—A conveyance by a husband to his wife, made pending a suit against him, and only a few days before judgment was rendered, leaving him nothing out of which the judgment could be satisfied, is *prima facie* fraudulent: *Booker v. Worrill*, 57 Ga. 235; and may be set aside by the creditor defrauded: *Barth v. Heider*, 7 D. C. 71. Such conveyances are usually made with the intent to defeat an execution levy on the judgment which may be rendered, and are, therefore, fraudulent and void, as to the judgment creditor: *Wise v. Moore*, 31 Ga. 148; *Village of St. Johns v. McFarlan*, 33 Mich. 73, 20 Am. Rep. 671. There exists an intent to defraud creditors, where a husband, in anticipation of suits against him, conveys his property to his wife upon her promise that she will maintain him for life: *Mullenneaux v. Terwilliger*, 50 Hun, 526, 3 N. Y. Supp. 442.

c. Effect as to Subsequent Creditors.

1. When Husband in Debt.—A voluntary conveyance by a person in debt is not *per se* fraudulent as to subsequent creditors; there must be proof of actual or intentional fraud: *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323. The fact that there are pre-existing debts is always important in determining the existence of a fraudulent intent: *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946. If the conveyance is made with a view to becoming subsequently indebted, there is no doubt that subsequent creditors may attack the conveyance, for the necessary intent to defraud such creditors is to be inferred from such circumstances: *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323; *Bridgford v. Riddell*, 55 Ill. 261; *Savage v. Murphy*, 34 N. Y. 508, 90 Am. Dec. 733. And, naturally, if a voluntary conveyance is made with the intent to defraud either existing or subsequent creditors, it is void as to the creditors to whom the fraudulent intent extends: *Churchill v. Wells*, 7 Cold. 364. In Michigan it appears to be settled that a conveyance which is fraudulent as to existing creditors is fraudulent as to subsequent creditors: *Herschfeldt v. George*, 6 Mich. 456. So that a voluntary conveyance to a wife by a husband, who is heavily indebted, would be fraudulent as to subsequent creditors. And it is clear that there is sufficient indication of an intent to defraud subsequent creditors, if a husband, considerably in debt, makes a voluntary conveyance to his wife, conceals such transfer, and still holding himself out as the owner of the property, contracts other debts: *Herschfeldt v. George*, 6 Mich. 456; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 Am. St. Rep. 78, 6 S. W. 323.

2. When Husband not in Debt.—Even a voluntary conveyance, made by a husband to his wife when he is not in debt, and with no

intention to defraud creditors, furnishes no ground of complaint by subsequent creditors: *Sanderson v. Streeter*, 14 Kan. 458; in the absence of any actual intent to defraud them: *Martin v. Olliver*, 9 Humph. 561, 49 Am. Dec. 717; *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156. No such intent exists if the conveyance is not made with a view of becoming indebted in the future: *Martin v. Olliver*, 9 Humph. 561, 49 Am. Dec. 717; or the grantor was not about to enter into any hazardous business: *Thompson v. Thompson*, 82 Pa. St. 378; *Mumma v. Weaver*, 2 Pears. 172. And a conveyance of even all a man's property to his wife will be valid against subsequent creditors, if it is not made in contemplation of future fraudulent indebtedness: *Kinealy v. Macklin*, 89 Mo. 433, 14 S. W. 507; *Haskell v. Bakewell*, 10 B. Mon. 206; *Cramer v. Bode*, 24 Ill. App. 219. But if the conveyance is made with a view of placing it beyond the reach of future creditors, it may be avoided by future creditors, especially where they have relied upon his ownership of the property and were ignorant of the transfer: *Carr v. Breese*, 18 Hun, 134; *Woolston's Appeal*, 51 Pa. St. 452. The mere transfer of property to one's wife just before engaging in a hazardous business is not necessarily a fraud as to future creditors, unless there is an intent to protect such property from their grasp: *Larkin v. McMullin*, 49 Pa. St. 29. But the fact that the husband enters into a hazardous business or engages in a speculative enterprise at or soon after the execution of a voluntary conveyance is strong evidence of a fraudulent intent: *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946; *Thompson v. Dougherty*, 12 Serg. & R. 448. Though it seems that such an intent is not to be inferred where the grantor examined into the business venture, and was assured and honestly believed it was safe: *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946. If, however, it was his purpose to secure his property for the benefit of himself and his family, in the event of losses in the hazardous business, the conveyance will be fraudulent and void as to his subsequent creditors: *Mullen v. Wilson*, 44 Pa. St. 413, 84 Am. Dec. 461; *Case v. Phelps*, 39 N. Y. 164; *Sommermeier v. Schwartz*, 89 Wis. 66, 61 N. W. 311. So where a husband conveys property to his wife for the purpose of improving it at the expense of subsequent creditors, the conveyance is fraudulent as to such creditors who have no knowledge thereof: *Wynne v. Mason*, 72 Miss. 424, 18 South. 422. The general rule applicable to conveyances to a wife which affect subsequent creditors was stated in *Schreyer v. Scott*, 134 U. S. 411, 10 Sup. Ct. Rep. 579, to be, "that even a voluntary conveyance from husband to wife is good as against subsequent creditors, unless it was made with the intent to defraud such subsequent creditors; or there was a secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be

cast upon the parties having dealings with him in a new business." This statement of the law was expressly approved in *Neuberger v. Keim*, 134 N. Y. 35, 31 N. E. 268.

VI. Wife's Knowledge of Fraudulent Intent.

An antenuptial settlement upon a wife made in consideration of marriage, though the prospective husband intended to defraud his creditors, will not be set aside in the absence of the clearest proof of his intended wife's participation in the fraud: *Prewit v. Wilson*, 103 U. S. 22. It must be shown that both parties to the conveyance participated in the fraud, in order to avoid an antenuptial contract made in consideration of marriage: *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303. The circumstances may be such, however, that a prospective wife will be presumed to have notice of her intended husband's fraudulent intent, and in such a case the conveyance may be avoided. This was so held in a case where a man conveyed land to his intended wife to avoid the payment of a judgment about to be obtained against him in a suit for seduction and breach of promise of marriage. All the facts and circumstances were known to the intended wife: *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

In a conveyance to a wife subsequent to marriage, however, it is not necessary that the wife should have actual knowledge of her husband's fraud, if the conveyance was without consideration: *Spinner v. Weick*, 50 Ind. 213; *McCole v. Loehr*, 79 Ind. 430; *Phillips v. Kennedy*, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147; *Smart v. Harring*, 52 How. Pr. 505. The knowledge or motive of the grantee is unimportant in cases where there is no valuable consideration for the transfer: *Whyte v. Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577. She need not be a party in any manner to the fraud of her husband: *Mendenhall v. Treadway*, 44 Ind. 131. And may be entirely ignorant of the effect of the conveyance upon her husband's creditors: *Gwynn v. Butler*, 17 Colo. 114, 28 Pac. 466. In some of the cases it is said that the intention of the husband is presumed to be known to the wife, and from the relation of the parties, it is scarcely to be supposed that this is not so: *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277. That a wife had knowledge of the indebtedness or insolvency of her husband may be inferred from circumstances: *Zimmerman v. Heinrichs*, 43 Iowa, 260. And this, although there may have been some alleged consideration to support the conveyance to the wife: *Leich v. Dee*, 86 Iowa, 709, 47 N. W. 881, 52 N. W. 209. The wife, although a purchaser in such a case for value, must be an innocent purchaser as well. And hence where her husband acts as her agent in procuring a transfer to herself through a third person, knowledge of his fraudulent intent may be imputed to her, though she was innocent of any actual knowledge thereof: *Trumbull v. Hewitt*, 63 Conn. 60, 31 Atl. 492.

VII. Marriage Settlements.**a. Antenuptial Settlements.**

1. Generally.—A marriage settlement made in good faith before and in contemplation of marriage is good against the creditors of the husband: *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 206; even though the husband is in debt at the time: *Betts v. Union Bank*, 1 Har. & G. 175, 18 Am. Dec. 283; *Reade v. Livingston*, 3 Johns. Ch. 494, 8 Am. Dec. 520. And it has been held that a settlement would be valid if made upon a valuable and adequate consideration, though the husband was insolvent, where this fact was unknown to the wife: *Prewit v. Wilson*, 103 U. S. 22. But a marriage settlement cannot be made a cover for fraud, even though there is a valuable consideration to support it: *Wilson v. Prewit*, 3 Woods, 631, Fed. Cas. No. 17,828. Yet to overthrow it as against creditors, the wife must participate in the fraudulent intent: *Prewit v. Wilson*, 103 U. S. 22.

An antenuptial agreement will be sustained whether the husband settles his own property on his wife, or secures to her the use and control of her own property and its proceeds: *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. Dec. 206; *Sanford v. Atwood*, 44 Conn. 141.

2. Conveyance in Consideration of Marriage.—Marriage has been said to be not only a valuable consideration, but there is no other consideration so much respected in the law: *Prewit v. Wilson*, 103 U. S. 22; *Magniac v. Thompson*, 7 Pet. 348; *Magniac v. Thompson*, Bald. 344, Fed. Cas. No. 8956. If the contract of marriage is executed, the wife becomes a purchaser for value, though the husband was in debt at the time: *Magniac v. Thompson*, Bald. 344, Fed. Cas. No. 8956. And a promise to marry is a good consideration for a conveyance, although the marriage is prevented by the grantor's death, and the intended wife will be entitled to hold the property as against the creditors of the grantor: *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758.

Marriage is a good consideration to sustain a conveyance to an intended wife, though the prospective husband is insolvent at the time, if the wife had no notice or knowledge of such fact: *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617. If, however, she knows of his indebtedness, and that he does not retain sufficient property to pay his creditors, the conveyance will be void as against them: *Keep v. Keep*, 7 Abb. N. C. 240; *Harmon v. Ryan*, 10 La. Ann. 661. In *Davidson v. Graves*, Riley, 232, it was said that the reasonableness of a settlement might be inquired into, and where a man, heavily in debt, conveyed all his property to his wife in consideration of marriage, this fact might be conclusive evidence that the conveyance was fraudulent as against creditors. Where the wife knew of the insolvent condition of the husband, a conveyance to her may be avoided by creditors, although she gave up a profitable business to marry the grantor: *Keep v. Keep*, 7 Abb. N. C. 240.

Generally, a conveyance to a woman in consideration of marriage will be valid against creditors in the absence of actual fraud: *Rivers v. Thayer*, 7 Rich. Eq. 136; *Clark v. McMahon*, 170 Mass. 91, 48 N. E. 939. And the wife herself must share in the fraud, as has already been noted: See, further, *Boggess v. Richards*, 39 W. Va. 567, 20 S. E. 599. A wife does not participate in the fraudulent intent of her prospective husband merely because he is heavily in debt and conveys his whole estate to her: *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405. This case, not only in principle, but in express terms, disapproves the doctrine of *Davidson v. Graves*, Riley, 232, which has just been noted. But the South Carolina doctrine has remained the same since the decision in *Davidson v. Graves*, Riley, 232. It has been held in later cases that where a man on the eve of his marriage conveys his entire estate to his intended wife to defeat his creditors, the deed is fraudulent and void, notwithstanding the ignorance and innocence of the intended wife: *McGowan v. Hitt*, 16 S. C. 602, 42 Am. Rep. 650; *Croft v. Arthurs*, 3 Desaus. Eq. 223. Such, however, is not the doctrine prevailing generally. A conveyance to an intended wife will be valid, notwithstanding the fraudulent intent and prior indebtedness of the prospective husband, if the intended wife did not know of such facts nor share in them: *Bunnel v. Witherow*, 29 Ind. 123; *State v. Osborn*, 143 Ind. 671, 42 N. E. 921; *Gibson v. Bennett*, 79 Me. 302, 9 Atl. 727; *National Exchange Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 13; *Metz v. Blackburn*, 9 Wyo. 481, 65 Pac. 857; *Nance v. Nance*, 84 Ala. 375, 5 Am. St. Rep. 378, 4 South. 699. Both husband and wife must concur in the fraud: *Bonser v. Miller*, 5 Or. 110; or at least the wife must know of the husband's intent: *Pierce v. Harrington*, 58 Vt. 649, 7 Atl. 462.

3. Conveyance After Marriage in Accordance with Prior Agreement.—A marriage settlement made after marriage in accordance with an agreement made in contemplation of marriage is clearly valid if there are no existing creditors whose rights will be affected: *Dabney v. Kennedy*, 7 Gratt. 317; or if the husband is perfectly solvent: *Campbell etc. Co. v. Ross*, 86 Ill. App. 356. The conveyance is not fraudulent and void as a matter of law, though the husband owes some debts: *Clarke v. McMahon*, 170 Mass. 91, 48 N. E. 939.

Under the statute of frauds, a verbal antenuptial contract is void, though it is followed by marriage, and is not a sufficient consideration to support a conveyance of property after marriage, in pursuance thereof, so as to defeat the rights of intervening creditors: *Keady v. White*, 168 Ill. 76, 48 N. E. 314; *Whyte v. Denike*, 53 App. Div. 320, 65 N. Y. Supp. 577; *Dygert v. Remerschnider*, 32 N. Y. 629; *Reade v. Livingston*, 3 Johns. Ch. 481, 8 Am. Dec. 520; *Wood v. Savage*, 2 Doug. 316. For a postnuptial settlement, made in pursuance of an antenuptial parol promise, is voluntary: *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810. The solemnization of marriage is not such a part performance as equity will consider sufficient to take the

case out of the statute of frauds: *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810; *Flory v. Houck*, 186 Pa. St. 263, 40 Atl. 482.

But if there is other valuable and adequate consideration for the conveyance, aside from the mere promise to marry which has been performed, a conveyance after marriage in accordance with such antenuptial parol promise will be good even as against creditors: *Dygert v. Remerschnider*, 32 N. Y. 629; *Lockwood v. Nelson*, 16 Ala. 294; *United States v. May*, 2 Cranch C. C. 507, Fed. Cas. No. 15,751. And if the antenuptial contract is in writing, a conveyance in accordance with it will be sustained: *Sanders v. Miller*, 79 Ky. 517, 42 Am. Rep. 237; *Kinnard v. Daniel*, 13 B. Mon. 496; *North Platte Milling etc. Co. v. Price*, 4 Wyo. 293, 33 Pac. 664. Where a conveyance is not made until many years after the marriage, after he has become insolvent, it will not be upheld as against the rights of creditors: *Tapp v. Todd* (Ky.), 16 Ky. Law Rep. 382, 28 S. W. 147.

4. **Effect as to Subsequent Creditors.**—A conveyance made in consideration of the approaching marriage of the parties is valid, and cannot be attacked by subsequent creditors: *Ploss v. Thomas*, 6 Mo. App. 157; *National Exchange Bank v. Watson*, 13 R. I. 91, 43 Am. Rep. 13. The same is true of a conveyance after marriage, in accordance with an antenuptial agreement, where the husband is solvent: *Campbell etc. Co. v. Ross*, 86 Ill. App. 356; *North Platte Milling etc. Co. v. Price*, 4 Wyo. 293, 33 Pac. 664. And an agreement, though verbal, on the part of a woman to marry and pay the existing debts of her intended husband, is a good consideration for a conveyance of land to her after marriage, and such a conveyance cannot be impeached by the subsequent creditors of the husband: *Dygert v. Remerschnider*, 32 N. Y. 629, affirming 39 Barb. 417. But an antenuptial agreement, by which a wife is to hold her own earnings to her separate use is invalid, both as to previous or subsequent creditors of the husband: *Keith v. Woombell*, 8 Pick. 211.

b. Postnuptial Settlements.

1. **Consideration Generally.**—Where a man is indebted but little, is doing a prosperous business, and is not embarrassed in his circumstances, he may make a valid postnuptial settlement upon his wife: *Offutt v. King*, 1 McAr. (D. C.) 312. For a conveyance for the benefit of a wife is on a meritorious consideration, and if the husband is not indebted beyond his probable means of payment, it is not deemed fraudulent as to creditors: *Jaquith v. Massachusetts etc. Convention*, 172 Mass. 439, 52 N. E. 544. And if such a settlement is made for an honest purpose and a good consideration, it will be valid as to creditors: *Butler v. Rickets*, 11 Iowa, 107. Money advanced by a woman to her husband before and after marriage, from her separate estate, is a sufficient consideration to support a postnuptial agreement: *Butler v. Rickets*, 11 Iowa, 107. So where a wife's money is invested by her father in land, in connection with money furnished by the husband, under an agreement that she was to have her pro-

portionate interest in the land, a subsequent settlement on the wife, not out of proportion to the amount of her money used, is valid: *Sparks v. Colson*, 23 Ky. Law Rep. 145, 63 S. W. 739. And a settlement upon a wife on a separation is valid as to creditors, where the trustee covenants to save the husband harmless against the wife's debts: *Hargroves v. Meray*, 2 Hill Eq. 222.

A postnuptial settlement founded upon no other consideration than the previous marriage is voluntary, and may be avoided by existing creditors: *Davidson v. Graves*, Riley, 232. But if the promise to convey in consideration of marriage was made before the marriage, it will constitute a sufficient consideration, if otherwise good: *Marmon v. White*, 151 Ind. 445, 51 N. E. 930.

The simple fact that a husband used his wife's money is not a sufficient consideration to support a postnuptial settlement, unless at the time he received the money it was understood to be a loan, and that the relation of debtor and creditor was created: *Beecher v. Wilson etc. Co.*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209.

A voluntary postnuptial settlement on a wife by her husband at a time when he is involved in debt is fraudulent as against existing creditors, no matter how pure the motive which induced it: *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810; *Kissam v. Edmonston*, 36 N. C. 180; *Fink etc. Co. v. Denny*, 75 Va. 663; *De Farges v. Ryland*, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; *Bank v. Ennis*, Wright, 604. Especially where the settlement is not made in pursuance of an antenuptial agreement: *Deubell v. Fisher*, R. M. Charl't. 36.

A postnuptial settlement is prima facie void as against pre-existing creditors: *Beecher v. Wilson etc. Co.*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155. And where the settlement is purely voluntary, the presumption of fraud has been said to be conclusive, in respect to existing debts: *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810. But the mere fact that the conveyance is voluntary does not make it fraudulent, where the husband owes no debts and has other property: *Teasdale v. Reaborne*, 2 Bay, 546; and the rights of existing creditors cannot be injured: *Reynolds v. Lansford*, 16 Tex. 286. If the husband is in debt, however, a voluntary postnuptial settlement will be set aside as against existing creditors, unless a valuable consideration is shown: *De Farges v. Ryland*, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805. Such a settlement will be presumed to be voluntary in the absence of evidence to the contrary: *Flynn v. Jackson Bros.*, 93 Va. 341, 25 S. E. 1. And evidence that the settlement was made in consideration of services of the wife does not establish a valuable consideration. The settlement is nevertheless voluntary: *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155.

A trust deed made by an insolvent for the benefit of his wife, executed without consideration, is void as to existing creditors:

Doughty v. King, 10 N. J. Eq. 396; Costillo v. Thompson, 9 Ala. 937; Sweeney v. Damron, 47 Ill. 450.

2. **Consideration of Property Acquired by Marriage.**—A husband cannot, to the prejudice of his creditors, settle on his wife, without a valuable consideration, property that may have come to him by means of the marriage: Potter v. McDowell, 31 Mo. 62. Personal property acquired by marriage is not a valuable consideration to support a subsequent deed: Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519. It became the absolute property of the husband, either at marriage or when reduced to possession, and a deed made thereafter in consideration of such property would be voluntary and could be attacked by pre-existing creditors: Bridgford v. Riddell, 55 Ill. 261; Trustees v. Bryson, 34 S. C. 401, 13 S. E. 619. Choses in action were not regarded as property in his possession until he collected them or reduced them to judgment. And if before such time the husband made or agreed to make a settlement on his wife in consideration of such personal property, he might do so, and, if reasonable, would be sustained as against creditors. A husband was not obliged to assert his marital rights over such personal property, and if he declined to do so, and secured it to his wife or received it as hers before his title became absolute, it was a good consideration for a settlement: Trustees v. Bryson, 34 S. C. 401, 13 S. E. 619; Kennedy v. Head, 32 Ga. 629.

As to real estate, the matter was different. This kind of property belonged to her and did not vest in her husband by virtue of the marriage. Hence, the renunciation of her inheritance in her own lands was a valuable consideration for a postnuptial settlement, for she could not be deprived of such property without her consent: Bank of United States v. Brown, 2 Hill Eq. 558, 30 Am. Dec. 380; Bank of United States v. Brown, Riley Eq. 131. This entire question will be again noticed under "Sufficiency of Consideration."

3. **Consideration of Release of Dower.**—A wife's relinquishment of dower is a sufficient consideration for a settlement upon her by her husband out of his own property: Hershy v. Latham, 46 Ark. 542; Keagy v. Trout, 85 Va. 390, 7 S. E. 329; Harvey v. Alexander, 1 Rand. 219, 10 Am. Dec. 519; Ficklin v. Rixey, 89 Va. 832, 37 Am. St. Rep. 891, 17 S. E. 325. The settlement is good though made after the relinquishment of dower: Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102. Such a settlement will not be disturbed unless it manifestly appears to be grossly excessive: Burwell v. Lumsden, 24 Gratt. 443, 18 Am. Rep. 648. The mere fact that the property settled is of greater value than the dower released will not render the settlement void: Hoot v. Sorrell, 11 Ala. 386. Although the conveyance may be vacated as to the excess: Burwell v. Lumsden, 24 Gratt. 443, 18 Am. Rep. 648. It will be valid, however, to the extent of the value of the dower: Ficklin v. Rixey, 89 Va. 832, 37 Am. St. Rep. 891, 17 S. E. 325. But to support such a settlement

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as to existing creditors, there must have been some agreement at the time the dower was released. And the voluntary relinquishment of her dower right by a wife, in the absence of any contract to make a settlement on her therefor, will not sustain a subsequent settlement which defeats the rights of existing creditors: *Lewis v. Caperton*, 8 Gratt. 148.

4. Effect as to Subsequent Creditors.—A voluntary postnuptial settlement is usually valid as against subsequent creditors, when there is no fraud, and the husband is not in debt when he makes it: *De Farges v. Ryland*, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; *Bank of United States v. Ennis*, Wright, 604; *Seaman v. Wall*, 54 How. Pr. 47; *Sexton v. Wheaton*, 8 Wheat. 229; *Atkinson v. Phillips*, 1 Md. Ch. 507; *Vertner v. Humphreys*, 14 Smedes & M. 130. And it is immaterial that the property conveyed constitutes the greater portion or even all of the husband's property: *Thompson v. Allen*, 103 Pa. St. 44, 49 Am. Rep. 116. If the husband is heavily in debt, however, this fact is important, and raises a presumption that the settlement was intended to defraud all creditors, and if the grantor is insolvent, it has been held that the settlement was void as to subsequent creditors: *Vertner v. Humphreys*, 14 Smedes & M. 130. But under a statute providing that a conveyance shall be void only as to those who are thereby defrauded, a voluntary settlement will not be held void as to subsequent creditors, though it is as to existing creditors, unless the property remained so situated as to induce future credit to the husband. And this is true though the purpose of the settlement was to protect such property from debts which might subsequently be contracted: *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412.

VIII. Consideration as Affecting the Question.

a. Necessity for Consideration.—We have already seen that a consideration is not always essential to the validity of a conveyance from husband to wife. When he is not in debt or has more than sufficient property out of which to satisfy his creditors, a voluntary conveyance to his wife will be sustained. A consideration is essential only where the rights of creditors are interfered with or prejudiced in some manner.

When pre-existing creditors attack a conveyance from husband to wife, the presumption is that the money which paid for the property belonged to the husband: *Rugless v. Robinson*, 22 Ky. Law Rep. 437, 57 S. W. 619. The absence of consideration is merely a circumstance bearing on the question of fraud: *Holden v. Burnham*, 63 N. Y. 74. But if there are existing creditors who by reason of the conveyance are prevented from collecting their claims, a conveyance without consideration is a fraud upon their rights: *Watson v. Riskamire*, 45 Iowa, 231; *Spinner v. Weick*, 50 Ind. 213; *Phillips v. Rhodes*, 21 Colo. 217, 40 Pac. 453; *Fowler v. Trebein*, 16 Ohio St. 493, 91 Am. Dec. 95. A conveyance to a wife for the purpose

of keeping it away from creditors is fraudulent and void: *Henderson v. Henderson*, 133 Pa. St. 399, 19 Am. St. Rep. 650, 19 Atl. 424. A conveyance by an insolvent husband to his wife, there being no consideration, will be set aside as fraudulent to his existing creditors: *De Prato v. Jester* (Ark.), 20 S. W. 807. Neither will a conveyance without consideration be upheld to the prejudice of existing creditors, where the husband and wife by their joint industry have acquired the property: *Langford v. Thurlby*, 60 Iowa, 105, 14 N. W. 135. So community property conveyed to the wife may still be reached by community creditors, there being no consideration therefor, and the husband retaining no other property with which to pay debts: *Klosterman v. Harrington*, 11 Wash. 138, 39 Pac. 376. But a conveyance to a wife of community property is not fraudulent as against creditors of the husband upon his separate debts: *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 261. A judgment in favor of a wife, where there is no consideration to support it, may be avoided by existing creditors who are injured thereby: *Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772. So where an insolvent sells land, he cannot take purchase money notes payable to his wife, as against his creditors: *McCaffrey v. Dustin*, 43 Ill. App. 34. Neither can an insolvent husband make an assignment without consideration for the benefit of his wife: *Bennett v. McGuire*, 5 Lans. 183.

At common law any conveyance from husband directly to his wife was void at law, and would be protected in equity as against existing creditors only when supported by a valuable consideration: *Stickney v. Borman*, 2 Pa. St. 67. And a mere recital of a valuable consideration is not sufficient to sustain the conveyance. There must be other proof: *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599. The conveyance must be upon a valuable consideration and made in good faith: *Castro v. Illies*, 22 Tex. 479, 73 Am. Dec. 277; for a valuable consideration will not help the conveyance if in fact made with fraudulent intent: *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. 681.

b. Voluntary Conveyance.

1. **Effect as to Existing Creditors.**—A voluntary conveyance from a husband to his wife is not for that reason fraudulent and void per se, even though the husband may have been in debt at the time: *Hank v. Van Ingen*, 97 Ill. App. 642; *Thomas v. Mackey*, 3 Colo. 390. The question is one of fact to be determined from the circumstances surrounding the transaction and the pecuniary condition of the husband: *Hank v. Van Ingen*, 97 Ill. App. 642. So, if he retains sufficient property with which to pay all of his debts, the conveyance is not fraudulent: *Taylor v. Eatman*, 92 N. C. 601; *Walton v. Parish*, 95 N. C. 259; *Kain v. Larkin*, 131 N. Y. 307, 30 N. E. 105; *Wiswell v. Jarvis*, 9 Fed. 84; *Morgan v. Hecker*, 74 Cal. 540, 16 Pac. 317.

But if the conveyance is kept secret and the husband continues to use the property as his own, this is evidence of a fraudulent scheme which will justify the setting aside of the conveyance if the husband subsequently becomes insolvent: *Guy v. Craighead*, 21 App. Div. 460, 47 N. Y. Supp. 576. The husband must at the time of the conveyance have ample property with which to satisfy his debts: *Palmer v. Smith*, 126 Mich. 352, 85 N. W. 870.

If a husband is not in debt, a conveyance in good faith is valid in all respects and for all purposes, notwithstanding its voluntary character: *Tootle etc. Co. v. Coldwell*, 30 Kan. 125, 1 Pac. 329. Good title is conveyed to the wife: *Otis v. Sprague*, 118 Mich. 61, 76 N. W. 154.

But a husband cannot give to his wife that which the law regards as belonging to his creditors. Hence, if his conveyance leaves him with an amount of property insufficient to pay his debts, it may be avoided at the instance of existing creditors: *Quinnipiac Brew. Co. v. Fitzgibbons*, 71 Conn. 80, 40 Atl. 913; *Ruse v. Bromberg*, 88 Ala. 619, 7 South. 384; *Keady v. White*, 168 Ill. 76, 48 N. E. 314; *Smith v. Sommers Mfg. Co.*, 69 Ill. App. 230; *Gardner v. Baker*, 25 Iowa, 343; *Robinson v. Clarke*, 76 Me. 493; *Myers v. King*, 42 Md. 65; *Fellows v. Smith*, 40 Mich. 689; *Elfelt v. Hinch*, 5 Or. 255; *Annin v. Annin*, 24 N. J. Eq. 184; *Core v. Cunningham*, 27 W. Va. 206; *Humphrey v. Spencer*, 36 W. Va. 11, 14 S. E. 410; *May v. Huntington*, 66 Ga. 208; *Clafin v. Ambrose*, 37 Fla. 78, 19 South. 628. And the fact that the transfer was made in good faith, and with no actual intent to defraud creditors, is immaterial, for the effect as to them is substantially the same as if it had been made fraudulently in fact: *Quinnipiac Brew. Co. v. Fitzgibbon*, 71 Conn. 80, 40 Atl. 913; *Ruse v. Bromberg*, 88 Ala. 619, 7 South. 384; *Robinson v. Clark*, 76 Me. 493; *Fellows v. Smith*, 40 Mich. 689; *Farmers' etc. Bank v. Price*, 41 Mo. App. 291; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. 143.

The fact that a husband is in debt at the time he makes a voluntary conveyance to his wife will make the conveyance only *prima facie* fraudulent: *Wiswell v. Jarvis*, 9 Fed. 84; *Water v. Lane*, 1 McAr. (D. C.) 275; *Kehr v. Smith*, 20 Wall. 31; *Salmon v. Bennett*, 1 Conn. 553, 7 Am. Dec. 237; *Elfelt v. Hinch*, 5 Or. 255; *Annin v. Annin*, 24 N. J. Eq. 184.

In those states, however, where the question of fraudulent intent is entirely one of fact, and never one of law, a voluntary conveyance is void or not as to creditors, according as the facts show a fraudulent intent to hinder, delay, or defraud existing creditors: *Morgan v. Hecker*, 74 Cal. 540, 16 Pac. 317.

Formerly, it seems to have been a question of doubt whether a gift to a wife by a husband who was indebted at all was absolutely void as to existing creditors: *Morgan v. Hecker*, 74 Cal. 540, 16 Pac. 317; *Duhme & Co. v. Young*, 3 Bush, 343. Chancellor Kent appears to have laid down the rule that such a gift was absolutely void:

Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520. But this view has not prevailed generally: See Salmon v. Bennett, 1 Conn. 553, 7 Am. Dec. 237; Hinds v. Longworth, 11 Wheat. 213; Duhme & Co. v. Young, 3 Bush, 343.

A gift by an insolvent husband to his wife is clearly in prejudice of the rights of existing creditors: Myers v. King, 42 Md. 65; Reppy v. Reppy, 46 Mo. 571; Wolters v. Rossi (Cal.), 57 Pac. 73; Triplett v. Graham, 58 Iowa, 135, 12 N. W. 143; Conway v. Brown, 5 Heisk. 237. But the mere existence of some indebtedness is only evidence of fraud: Woodson v. Pool, 19 Mo. 340; Rose v. Brown, 11 W. Va. 122. It raises a prima facie presumption of fraud: Stix v. Chaytor, 55 Ark. 116, 17 S. W. 707. It may be a badge of fraud, but the mere fact of indebtedness does not per se constitute a substantive ground to avoid a voluntary conveyance for fraud. The question of fraud is to be determined from all the facts in the case: Duhme & Co. v. Young, 3 Bush, 343. And while it seems to be inferred from some decisions that the mere existence of creditors will render a voluntary conveyance fraudulent and void as to such creditors: Landler v. Ziehr, 150 Mo. 403, 73 Am. St. Rep. 456, 51 S. W. 742; Annin v. Annin, 24 N. J. Eq. 184; yet the great weight of authority is undoubtedly to the effect that the husband must be either insolvent or at least largely indebted, or the conveyance will not be fraudulent as to his creditors. And this is clearly the correct doctrine, for the mere fact that the husband had a few trifling debts at the time he makes a voluntary conveyance is of little importance if he has plenty of other property with which to pay them: See Triplett v. Graham, 58 Iowa, 135, 12 N. W. 143; Duhme & Co. v. Young, 3 Bush, 343.

The assignment to a wife of an insurance policy when the husband is insolvent is fraudulent as to creditors, where no consideration was received therefor: McKown's Estate, 198 Pa. St. 96, 47 Atl. 1111. But not if the insurance policy has no vendible value: Steeley v. Steeley, 23 Ky. Law Rep. 996, 64 S. W. 642.

2. **Effect as to Subsequent Creditors.**—A gift or voluntary conveyance by a husband to his wife is usually good as against subsequent creditors: Davidson v. Lanier, 51 Ala. 318; Lucas v. Lucas, 103 Ill. 121; King & Co. v. Wells, 106 Iowa, 649, 77 N. W. 338; Duhme v. Young, 3 Bush, 343; Place v. Rhem, 7 Bush, 585; Davis v. Herrick, 37 Me. 397; Phillips v. Wooster, 36 N. Y. 412; McClaugherty v. Morgan, 36 W. Va. 191, 14 S. E. 992; Wheeler etc. Co. v. Monahan, 63 Wis. 198, 23 N. W. 127; especially if the husband is not in debt at the time: Wells v. Stout, 9 Cal. 480; Kane v. Desmond, 63 Cal. 464. The conveyance must be made with the intent to hinder or defraud subsequent creditors, or it will not be void as to them: King & Co. v. Wells, 106 Iowa, 649, 77 N. W. 338; Davidson v. Lanier, 51 Ala. 318; Niller v. Johnson, 27 Md. 6; Boatmen's Sav. Bank v. Overall, 16 Mo. App. 510. Such a fraudulent intent sufficiently appears where the conveyance is made in con-

temptation of contracting future debts and to prevent the property from being taken for such debts: *Morton v. Denham*, 39 Or. 227, 64 Pac. 384; *Lander v. Ziehr*, 150 Mo. 403, 73 Am. St. Rep. 456, 51 S. W. 742; and also where the husband makes the conveyance with a view of engaging or continuing in some hazardous undertaking: *Minzesheimer v. Doolittle*, 56 N. J. Eq. 206, 39 Atl. 386; *Hatch v. Reid*, 112 Mich. 430, 70 N. W. 889.

c. Illegal Consideration.—A conveyance based upon an illegal consideration will not be upheld where the rights of creditors have been prejudiced. Hence, it has been held that a conveyance to a wife on condition that she will withdraw a suit for limited divorce, and that she shall thereafter live apart from her husband, is fraudulent and void as to existing creditors: *Morgan v. Potter*, 17 Hun, 403; *Friedman v. Bierman*, 43 Hun, 387. Neither is an agreement of a wife to live with her husband at a particular place a legal consideration: *Radley v. Riker*, 80 Hun, 353, 30 N. Y. Supp. 130.

d. Fictitious Consideration.—Where the consideration named in a deed for the benefit of a wife is fictitious, the conveyance will be fraudulent and void as to creditors the same as any other voluntary conveyance: *Robert v. Hodges*, 16 N. J. Eq. 299; *Hodges v. Hickey*, 67 Miss. 715, 7 South. 404.

e. Purchase in Wife's Name.

1. Consideration Paid by Husband.—A purchase of property in the name of a wife, the consideration being furnished by the husband, is *prima facie* a gift, and is to be treated the same as any voluntary conveyance. Hence, if the husband is not indebted at the time, or he does not intend to defeat his subsequent creditors, the property will belong to the wife, free from the claim of her husband or his creditors: *Pitkin v. Mott*, 56 Mo. App. 401. The same rule prevails where the husband, although in debt, had ample means with which to pay such debts: *New South Bldg. etc. Assn. v. Reed*, 96 Va. 345, 70 Am. St. Rep. 858, 31 S. E. 514.

If, however, the husband is involved in debt at the time of such purchase, the conveyance will be constructively fraudulent as to the existing creditors: *Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616; *Robinson v. Woolstein*, 22 Ky. Law Rep. 883, 58 S. W. 706. A fraudulent intent is imputed in such a case: *Wolford v. Farnham*, 44 Minn. 159, 46 N. W. 295. And the same result follows as in any voluntary conveyance. In other words, where property is purchased in a wife's name, or conveyed to her, her husband paying the consideration, it will be fraudulent as to existing creditors, and may be set aside by them, if the husband has no property with which to pay his debts: *Wilds v. Bogan*, 55 Ind. 331; *Dickinson v. Johnson*, 22 Ky. Law Rep. 1686, 61 S. W. 267; *Peevey v. Cabaniss*, 70 Ala. 253; *Stix v. Chaytor*, 55 Ark. 116, 17 S. W. 707; *Craig v. Gamble*, 5 Fla. 430; *Adams v. O'Rear*, 80 Ky. 129; *Call v. Perkins*, 65 Mo. 429; *Bernheim v. Beer*, 56 Miss. 149; *Foster v. Knowles*, 42 N. J. Eq. 226, 7 Atl. 290; *Hoxie*

v. Price, 31 Wis. 82; *McMasters v. Edgar*, 22 W. Va. 673; *Holmes v. Harshberger*, 31 W. Va. 516, 7 S. E. 452; *Mead v. Gregg*, 12 Barb. 653; *Matthews v. Torinus*, 22 Minn. 132.

Even if a husband is but little in debt when land is purchased in his wife's name, yet if he later becomes in debt, before making the payments upon the purchase price, the land may be subjected to the payment of his debts to the extent of such payments, since this money has in this manner been diverted from its proper use: *Rose v. Brown*, 11 W. Va. 122; *Hearn v. Lander*, 11 Bush, 669. So a taking of corporate stock in a wife's name will be fraudulent as to existing creditors, where the husband pays for it by his services: *Markham v. Whitehurst*, 109 N. C. 307, 13 S. E. 904. And where a wife purchases property with her husband's wages without his knowledge or assent, such property may be reached by his creditors: *Bresnihan v. Sheehan*, 125 Mass. 11. So a husband cannot rent a farm in his wife's name and keep the produce and stock raised thereon from the claims of his creditors: *Bucher v. Ream*, 68 Pa. St. 421. Neither can he carry on his business in the wife's name, and keep the property away from his creditors: *New v. Oldfield*, 110 Ill. 138. An insolvent husband cannot make a voluntary assignment of notes to his wife which will be valid against his creditors: *Reppy v. Reppy*, 46 Mo. 571. Where a husband's property is sold on execution, and is subsequently redeemed by his wife with the husband's money, the same judgment creditor may have the conveyance set aside, and the land again sold to satisfy the balance of his judgment: *Peckenbaugh v. Cook*, 61 Iowa, 477, 16 N. W. 530.

Any purchase in the name of the wife, paid for by the husband, may be avoided by creditors if it is intended to defraud: *Dockray v. Mason*, 48 Me. 178. Where a purchase is made in the name of a wife with or without her knowledge, it will be presumed that the consideration was paid by the husband, and the purchase would therefore be fraudulent as to creditors: *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486; *McMasters v. Edgar*, 22 W. Va. 673; *Burt v. Timmons*, 29 W. Va. 441, 6 Am. St. Rep. 664, 2 S. E. 780.

A purchase by a wife of her husband's property at a tax sale for one-tenth its value, she obtaining the purchase money by giving a note and mortgage on the property, the husband joining in the latter, is a fraud on creditors: *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378.

2. Resulting Trust in Favor of Creditors.—A purchase in the name of a wife with the husband's money does not create a resulting trust in favor of the husband, as a rule: *In re May*, 2 Fed. 845; *Lockhard v. Beckley*, 10 W. Va. 87. The presumption is that it was intended to be an advancement to the wife: *Irvine v. Greever*, 32 Gratt. 411; *Guthrie v. Gardner*, 19 Wend. 414. But such conveyances are voluntary, and when they result in prejudicing the rights of creditors, the creditors defrauded may impeach them: *Lockhard v. Beckley*, 10 W. Va. 87; and there will be a resulting trust in favor

of the creditors whose rights have been infringed: *Watson v. Le Row*, 6 Barb. 481; *Guthrie v. Gardner*, 19 Wend. 414; *Matthews v. Torinus*, 22 Minn. 132. The wife will be declared a trustee for the husband, for the benefit of his creditors: *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155.

3. **Purchase on Husband's Credit.**—As may be gathered from the cases previously cited, a purchase in the wife's name will be fraudulent as to creditors if purchased upon the husband's credit, although the money to pay for the property was borrowed in the name of the wife: *Backer v. Meyer*, 43 Fed. 702. And the same rule seems to prevail where the wife herself borrows the money in apparent good faith, the husband and wife joining in the execution of a mortgage to secure the payment of such money: *Pier v. Siegel*, 107 Pa. St. 502. In this case the wife had no separate estate.

4. **Effect as to Subsequent Creditors.**—As to subsequent creditors, a purchase in the wife's name upon a consideration paid by the husband is governed by the same rule as any other voluntary conveyance. If the husband is not in debt, and there is no intent to defraud subsequent creditors, it will be valid: *Pratt v. Myers*, 56 Ill. 23; *In re May*, 2 Fed. 845. But if it is fraudulent in fact, the conveyance will be void as to subsequent creditors: *Core v. Cunningham*, 27 W. Va. 206. And it may be avoided by subsequent creditors if they show antecedent debts, sufficient in amount to afford reasonable evidence of a fraudulent intent: *Mead v. Gregg*, 12 Barb. 653.

f. **Purchase by Wife.**—Purchases of property made by a wife while her husband is in debt or insolvent are justly regarded with suspicion, and the presumption is that the purchase was made with the husband's means: *Seitz v. Mitchell*, 94 U. S. 580; *Simms v. Morse*, 2 Fed. 325; *Treadway v. Turner* (Ky.), 10 S. W. 816; *Smith v. Cook*, 10 App. Cas. (D. C.) 487. This presumption must be overcome by proof, showing that the consideration was furnished by the wife: *Seitz v. Mitchell*, 94 U. S. 580; *Keeney v. Good*, 21 Pa. St. 349.

But where a husband's creditors take possession of the property and latter sell to the wife, there is usually no fraud and the conveyance may be good: *Frankenthal v. Gilbert*, 34 Fed. 5. She has a right to buy under such circumstances, and if she alone is looked to for the payment, the conveyance will be upheld: *Cheatham v. Thornton*, 11 Lea, 295. So a wife may purchase her husband's property at a public sale by an assignee for the benefit of creditors: *Hibbard etc. Co. v. Heckart*, 88 Mo. App. 544. And under the married women's acts she may make such a purchase entirely on credit, although she has no separate estate: *Walter v. Jones*, 148 Pa. St. 589, 24 Atl. 119; *Chatham v. Thornton*, 11 Lea, 295.

An execution sale to a wife of her husband's property will not be sustained where the entire transaction is simulated, with the evi-

dent purpose of defeating creditors: *Cox v. Miller*, 54 Tex. 16. But a wife may make a valid purchase of her husband's property at an execution sale upon her own credit: *Bollinger v. Gallagher*, 170 Pa. St. 84, 32 Atl. 569.

A wife may even purchase her husband's property at a tax sale, and it will not be fraudulent for that reason, if she had separate property: *Belcher v. Black*, 68 Ga. 93; *Howard v. Tenney*, 87 Ky. 52, 7 S. W. 547. But where the property was thus purchased for one-tenth its value, the wife obtaining the money by giving a note and mortgage therefor, the husband joining in the latter, the pretended purchase may be avoided by injured creditors: *Miller v. Leeper*, 120 Mo. 466, 25 S. W. 378.

Where by an antenuptial agreement the wife is to have the same rights in her separate property as a feme sole, she may with such property purchase mortgages or judgments against her husband and enforce them against him, and his creditors are not thereby defrauded: *Strong v. Skinner*, 4 Barb. 546. The same rule would appear to be true under most of the married women's acts. If a wife sells property which she has acquired in fraud of her husband's creditors, the purchaser may hold it and the transaction cannot be impeached, if he acted in good faith with no notice of the fraud and paid a valuable consideration for the property: *Lewis v. Dudley*, 70 N. H. 594, 49 Atl. 572.

g. Conveyance on Consideration Moving from Wife.

1. In General.—If it is clearly established that the consideration came from the wife's separate property, a conveyance to her will be sustained as against her husband's creditors: *Appeal of Bedell*, 87 Pa. St. 510; *Addicken v. Humphal*, 56 Iowa, 365, 9 N. W. 299; *Eads v. Thompson*, 109 Ill. 87; *Davis v. Fredericks*, 104 U. S. 618. For if the wife pays a full and adequate consideration for the property, the creditors lose nothing by reason of the transaction: *Teller v. Bishop*, 8 Minn. 226. And the conveyance will usually be sustained both at law and in equity: *Steadman v. Wilbur*, 7 R. I. 481. And the rule is the same where the husband, having the wife's separate property in his possession, invests it for her in land, the title to which is taken in her name: *McKamey v. Thorp*, 61 Tex. 648. Hence, the husband may, by the direction of his wife, sell her land and invest the proceeds in other lands: *Williams v. Morgan*, 6 Houst. 439. So where a wife joins her husband in buying and selling land, her money being used, land taken in her name is not in fraud of his creditors: *Myers v. White* (Ky.), 24 S. W. 1065. If a title bond is taken in the husband's name, a subsequent deed to the property in the name of the wife will be valid, where she paid the entire consideration: *Hamilton v. Steele*, 22 W. Va. 348.

A conveyance to a wife for a valid debt due her from her husband is good as against creditors: *Wooden v. Wooden*, 72 Mich. 347, 40 N. W. 460. And this is true though the debt due from the husband

is for property which represented the proceeds of previous gifts he had made to her when he was solvent: *Noel v. Gaines*, 23 Ky. Law Rep. 2093, 66 S. W. 625.

A conveyance to a wife will not be set aside, where none of the husband's means has gone into the property, although it was intended to keep the property from the husband's creditors: *McLean v. Hess*, 106 Ind. 555, 7 N. E. 567; *Quidort v. Pergeaux*, 18 N. J. Eq. 472.

2. Part of Consideration Paid by Wife.—Where nearly all the consideration was furnished by the wife, and it does not appear where the rest came from, it will not be presumed that it came from the husband, and the conveyance will be sustained: *White v. Clasby*, 101 Mo. 162, 14 S. W. 180. It is sufficient if the wife pays a material part of the consideration: *Bragg v. Stanford*, 82 Ind. 234. So a conveyance to the wife has been upheld where she paid two-thirds of the consideration: *Parton v. Yates*, 41 Ind. 456. The joinder of the husband in a note for a portion of the purchase price will not render the conveyance fraudulent: *Coffin v. Morrill*, 22 N. H. 352. But if the husband actually invests any of his money in the land, his creditors may reach it to that extent: *Reel v. Livingston*, 34 Fla. 377, 43 Am. St. Rep. 202, 16 South. 284. The wife will be treated as a trustee of the legal title pro tanto for the benefit of his creditors: *Hill v. Bugg*, 52 Miss. 397. If the conveyance to the wife was not made until creditors are pressing for the payment of their claims, the fact that the husband had used a part of the wife's separate money will not validate the conveyance, where there was no understanding that the land should belong to the wife until after the husband had received and applied his wife's money to his own use: *Curry v. Catlin*, 9 Wash. 495, 37 Pac. 678, 39 Pac. 101.

Where the wife pays but a very small part of the consideration price, and the husband is involved in debt, a conveyance to the wife may be reached by his existing creditors: *Stoutz v. Huger*, 107 Ala. 248, 18 South. 126. For in such a case the consideration paid by the wife is wholly inadequate, and the conveyance will therefore be regarded as voluntary: *Paulk v. Cooke*, 39 Conn. 566.

Where a part of the consideration is paid by the wife, a conveyance is not usually fraudulent as to subsequent creditors: *Place v. Rhem*, 7 Bush, 585. And this, though deferred payments upon the land are made with community funds: *Cavil v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854.

3. Conveyance Subsequent to Payment of Consideration.—Where the evidence shows that the money of the wife was intended to be given in consideration of the conveyance, the fact that the deed was not made for several months is immaterial: *Faitoute v. Sayre* (N. J.), 28 Atl. 711. So where land is purchased with a wife's money under an agreement or understanding that the deed should be made to her, a subsequent conveyance to her will be valid: *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482. And where title is taken in the name of both husband and wife, the wife furnishing the con-

sideration, a subsequent conveyance to the wife through a third person, although voluntary, will be sustained if the husband has sufficient other property to pay his debts: *Baldwin v. Ryan*, 3 *Thomp. & C.* 251. So where the husband purchases land in his own name with his wife's money, he may exchange the lands for others taking title in his wife's name, and the conveyance will be good unless the creditors have been misled: *Sweeney v. Damron*, 47 *Ill.* 450. Any purchase of land by a husband with property of his wife may be held by the husband in trust for the wife if his creditors are not misled by the transaction: *Cooper v. Standley*, 40 *Mo. App.* 138. But to sustain a later conveyance when a husband is heavily in debt, there must be an intentional connection between the advances of money made by the wife and the subsequent deed: *Wickes v. Clarke*, 3 *Edw. Ch.* 58.

4. Title First Taken in Husband's Name.

A. Without Wife's Consent.—It frequently happens that a husband purchases property for his wife with her separate money, and takes title in his own name. If title has been taken in the husband's name without the knowledge or consent of the wife, a subsequent conveyance to her is not fraudulent as against the husband's creditors: *Leonard v. Barnett*, 70 *Ind.* 367; *Eagan v. Downing*, 55 *Ind.* 65; *Clowser v. Noland*, 133 *Mo.* 221, 34 *S. W.* 64; *Heath v. Slocum*, 115 *Pa. St.* 549, 9 *Atl.* 259; *Campbell v. Campbell*, 79 *Ky.* 395; *Beck v. Shultz (N. J.)*, 32 *Atl.* 695; *Voorheis v. Blanton*, 89 *Fed.* 885; *Bancroft v. Curtis*, 108 *Mass.* 47; *Brown v. Wright*, 58 *Ark.* 20, 22 *S. W.* 1022; *Goldsmith v. Fuller*, 30 *Neb.* 563, 46 *N. W.* 712; *Taylor v. Duesterberg*, 109 *Ind.* 165, 9 *N. E.* 907; *Alkire Grocery Co. v. Ballenger*, 137 *Mo.* 369, 38 *S. W.* 911. And this is true though the conveyance is made many years after the property was first purchased with the wife's means: *Bishop v. Lord*, 83 *Ind.* 67. And though the conveyance was induced by a suit against the husband: *Beck v. Shultz (N. J.)*, 32 *Atl.* 695. Or was made after the husband had become deeply involved in debt: *Bishop v. Lord*, 83 *Ind.* 67; *Heaton v. White*, 85 *Ind.* 376; *Stetson v. O'Sullivan*, 8 *Allen*, 321. And for the purpose of keeping the property away from his creditors, in the absence of any question of estoppel: *Bangert v. Bangert*, 13 *Mo. App.* 144. But the mere fact that the husband owes the wife will not sustain a conveyance made with the fraudulent design to prevent the enforcement of an execution against the husband: *Straus v. Head*, 14 *Ky. Law Rep.* 740, 21 *S. W.* 537. A conveyance made just before the husband becomes insolvent is good, if not shown to be actually fraudulent: *Stetson v. O'Sullivan*, 8 *Allen*, 321.

A subsequent conveyance is clearly good, if the husband and wife have done nothing to induce his creditors to believe that he was the owner of the property and thus obtain credit: *Seeders v. Allen*, 98 *Ill.* 468. And the fact that the husband contracted debts while the title remained in his name will not, in the absence of bad faith

and fraudulent intent, estop the wife from asserting her title to the property: *Kemp v. Folsom*, 14 Wash. 16, 43 Pac. 1100. And it seems that if the husband obtained credit by reason of his supposed ownership, a conveyance to the wife may still be valid, if title was taken in her husband's name without her knowledge or consent, and she had no knowledge that her husband was using the property to obtain credit: *Alkire Grocery Co. v. Ballenger*, 137 Mo. 369, 38 S. W. 911. No act of the husband's under such circumstances can enlarge his interest in the property: *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907.

Where title is taken in the husband under a parol agreement to convey to the wife on demand, a subsequent conveyance to the wife will be sustained, where the wife paid the consideration: *Goldsmith v. Fuller*, 30 Neb. 563, 46 N. W. 712. So a conveyance to another in trust for the benefit of the wife, or to the wife through a third person, is valid, the wife having previously paid the consideration: *McLaurie v. Partlow*, 53 Ill. 340; *Phillips v. North*, 77 Ill. 243; *Campbell v. Campbell*, 79 Ky. 395.

B. To Give False Credit to Husband.—There may be circumstances, however, in which a subsequent conveyance to a wife will not be sustained as against creditors of the husband, notwithstanding the wife has paid the entire consideration for the property. And if title is taken in a husband's name to the knowledge of the wife, who consents thereto, and the husband acquires credit by reason of such supposed ownership in him, a conveyance cannot subsequently be made which will be valid as against creditors whose rights have intervened: See *Brooks v. Dent*, 1 Md. Ch. 523; *Hews v. Kenney*, 43 Neb. 815, 62 N. W. 204; *Zeller v. Light* (Pa.), 17 Atl. 433. And a contract of the husband to convey will not be enforced as against the rights of creditors which have intervened: *Darnaby v. Darnaby*, 14 Bush, 485.

A wife cannot allow her husband to use and appropriate her property as his own for years, and incorporate a part of his own means into it, and then, upon a conveyance of the whole from her husband, make a valid claim to it as against his creditors: *Moyer v. Adams*, 2 Fed. 182. Hence, where title to land is taken in the husband's name with the consent of the wife, and on the strength of such ownership the husband obtains credit, the fact that the husband had used a debt due the wife in part payment of land will not sustain a conveyance of the land to the wife. The wife, in such a case, allowed the husband to deal with the property as his own, and to obtain a fictitious basis of credit, and it would be a fraud to permit her to take and hold the property after her husband becomes insolvent, as against those who dealt with him on the strength of his ownership: *Van Duzen v. Hinz*, 108 Wis. 178, 84 N. W. 151. As is frequently said, the wife is estopped from asserting her claim to the property, as against creditors who have dealt with her husband upon the faith of his apparent ownership: *Sears*

v. Davis (Or.), 66 Pac. 913. The true ground upon which creditors are entitled to have such a conveyance set aside is that the debtor was permitted by the beneficiary to remain in the apparent ownership of the property, and to obtain financial credit on the strength of such apparent ownership: *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211. This case is an extreme one, because the conveyance was made to the wife before the claims of creditors had accrued, and the deed was a matter of record. The fact that the deed is made before the debts were contracted is immaterial, if the deed is not a matter of record: *Hoagland Bros. v. Wilson*, 15 Neb. 320, 18 N. W. 78. The facts of most of the cases do not go to the extent of the New Jersey case just cited. But the general rule itself is firmly settled that where the wife, although furnishing the consideration money, allows the title of the property to stand in the name of her husband, so that he obtains credit by reason of his apparent ownership, a conveyance to the wife cannot be sustained as against creditors who have given credit relying upon such ownership: *Lowentrout v. Campbell*, 130 Ill. 503, 22 N. E. 744; *Stillwell v. Stillwell* (N. J.), 18 Atl. 679; *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722; *City Nat. Bank v. Hamilton*, 34 N. J. Eq. 158; *Maddox v. Epler*, 48 Ill. App. 265; *White & Co. v. Magarahan*, 87 Ga. 217, 13 S. E. 509; *Minnich v. Shaffer*, 135 Ind. 634, 34 N. E. 987; *Myers v. Little*, 60 Miss. 203; *Wade v. Krumm*, 54 How. Pr. 95; *Cowling v. Hill*, 69 Ark. 350, 86 Am. St. Rep. 200, 63 S. W. 800; *Meade v. Stairs*, 88 Ky. 66, 10 S. W. 272; *Swartz v. McClelland*, 31 Neb. 646, 48 N. W. 461. So where a husband obtains a rating in a commercial agency through his apparent ownership of property, his wife is in no position to assert a claim to such property as against creditors: *Sloan v. Huntington*, 8 App. Div. 93, 40 N. Y. Supp. 393. The cases already cited show that the rule applies only when the creditors had no knowledge of the wife's interest: *Minnich v. Shaffer*, 135 Ind. 634, 34 N. E. 987. The general principle governing such cases was thus stated by Elliott, J., in *Hirsch v. Norton*, 115 Ind. 341, 17 N. E. 612: "Where a party, by clothing another with all the legal indicia of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer."

It appears to be immaterial whether the wife's money was invested in the land at the time of the purchase, or subsequently: *Myers v. Little*, 60 Miss. 203.

h. Sufficiency of Consideration.

1. **Inadequacy, Generally.**—Mere inadequacy of consideration in a conveyance from husband to wife will not of itself render the conveyance fraudulent and void as to creditors, even though the husband was insolvent at the time, though it may be a badge of fraud, and if gross and coupled with other circumstances, may amount to proof of actual fraud: *Hawkinsville Bank etc. Co. v. Walker*, 99 Ga. 242, 25 S. E. 205; *Tebbs v. Lee*, 76 Va. 744; *Motley v. Sawyer*,

38 Me. 68. Even great inadequacy of consideration will not render a conveyance fraudulent, where the husband is but little in debt: *Faitoute v. Sayre* (N. J.), 28 Atl. 711. Inadequacy of consideration may raise a presumption of fraud, however: *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 432. A wife will not be allowed to absorb all her husband's property under the cover of family support, so as to put it beyond the reach of creditors: *Trefethen v. Lynam*, 90 Me. 376, 60 Am. St. Rep. 271, 38 Atl. 335.

An agreement by a wife to live with her husband at a certain place is neither a legal nor a sufficient consideration to support a conveyance: *Radley v. Raker*, 80 Hun, 353, 30 N. Y. Supp. 130. A loan to a husband of money given to the wife for housekeeping purposes, and which she kept without his knowledge is not a good consideration, and a conveyance based upon it is voluntary: *Gable v. Columbus Cigar Factory*, 140 Ind. 563, 38 N. E. 474.

Although the consideration for a conveyance may be grossly inadequate, yet if the wife has no knowledge of her husband's fraudulent intent, it will be set aside upon such conditions as will protect the wife's actual interest in the property: *First Nat. Bank v. Smith*, 149 Ind. 443, 49 N. E. 376. A conveyance by an insolvent husband for a mere nominal consideration will be set aside as fraudulent: *Bolin v. Thompson*, 51 App. Div. 601, 64 N. Y. Supp. 203. A fraudulent intent on the part of the husband is to be inferred from a conveyance for a grossly inadequate consideration, if by such act he deprives himself of all power to pay his debts: *Sandman v. Seaman*, 84 Hun, 337, 32 N. Y. Supp. 338. A mere voluntary promise to give one's wife a sum of money is not a good consideration for a subsequent conveyance which leaves the husband insolvent: *Wynne v. Mason*, 72 Miss. 424, 18 South. 422. A conveyance of property for a consideration of but one-fifth its value is so grossly inadequate as to render the conveyance fraudulent, where the husband was insolvent at the time to the knowledge of the wife: *Wilson v. Jordan*, 3 Woods, 642, Fed. Cas. No. 17,814.

2. **Love and Affection.**—A conveyance in consideration of love and affection is purely voluntary, and may be avoided by existing creditors who are prejudiced thereby: *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Milholland v. Tiffany*, 69 Md. 455, 2 Atl. 831; *Baldwin v. Tuttle*, 23 Iowa, 66. If the husband is not in debt, or retains property sufficient and available to pay his debts, a conveyance in consideration of love and affection is valid, the same as any other voluntary conveyance: *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482.

3. Release of Dower Right.

A. **As Consideration, Generally.**—As previously pointed out under a different heading, a conveyance to a wife in consideration of a release by her of her right of dower is a valuable consideration

sufficient to sustain the conveyance as against creditors: *Gordon etc. Co. v. Tweedy*, 71 Ala. 202; *Keel v. Larkin*, 83 Ala. 142, 3 Am. St. Rep. 702, 3 South. 296; *Nalle v. Lively*, 15 Fla. 130; *Payne v. Miller*, 103 Ill. 442; *Brown v. Rawlings*, 72 Ind. 505; *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146; *Baldwin v. Heil*, 155 Ind. 682, 58 N. E. 200; *Singree v. Welch*, 32 Ohio St. 320; *Dick v. Hamilton*, Deady, 322, Fed. Cas. No. 3890; *Unger v. Price*, 9 Md. 552; *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Rundlett v. Ladd*, 59 N. H. 15.

And this is true whether the release is executed contemporaneously with the execution of the deed, or in pursuance of a previous agreement: *Gordon etc. Co. v. Tweedy*, 71 Ala. 202. But such contracts must be reasonable and free from fraud: *Gordon etc. Co. v. Tweedy*, 71 Ala. 202; *Rundlett v. Ladd*, 59 N. H. 15. And the property conveyed should be a fair equivalent for the dower released: *Nalle v. Lively*, 15 Fla. 130; *Bullard v. Briggs*, 7 Pick. 533, 19 Am. Dec. 292. The comparative value of the respective estates may be taken into consideration: *Hollowell v. Simonson*, 21 Ind. 398. The value of a wife's dower interest is determined on the basis of the real value of the property: *Baldwin v. Heil*, 155 Ind. 682, 58 N. E. 200. A conveyance will not be held fraudulent and void, unless the amount of consideration is so disproportioned to the value of the wife's contingent dower as to be unreasonable: *Singree v. Welch*, 32 Ohio St. 320. If a sum secured to a wife in consideration of her contingent right of dower be set aside as excessive, she will be restored, if practicable, to her former rights: *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279. A wife may sell her inchoate right of dower for the best price possible, without reference to her husband's financial condition, if she acts in good faith: *Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

Under the provisions of the Iowa code, all the interest which a wife may have in her husband's lands is subject to be divested by the sale of such lands for the satisfaction of her husband's debts. Hence, when a husband conveys land to a creditor in satisfaction of a debt, a release by his wife of her dower right therein is not a valuable consideration for a conveyance of other land to her, since she relinquishes nothing which, as against the husband's creditors, is of any value whatever: *Haynes v. Kline*, 64 Iowa, 308, 20 N. W. 453. And in Wisconsin it has been held that since a wife cannot make a release to her husband during coverture, an alleged release of dower to him furnishes no consideration for a conveyance to her: *Le Saulnier v. Krueger*, 85 Wis. 214, 54 N. W. 774.

B. To What Extent Valid.—If the dower interest released is equal or in excess of the value of the property conveyed to the wife, there can be no doubt of the validity of the conveyance, so far as it depends on the adequacy of the consideration: See *German-American Seminary v. Saenger*, 66 Mich. 249, 33 N. W. 301. And the mere fact that the wife has miscalculated the value of her dower

right does not show a fraudulent purpose: *Peaslee v. Collier*, 83 Mich. 549, 47 N. W. 353.

As a general rule, a release by a wife of her potential right of dower is a valuable consideration, sufficient to sustain a conveyance to her as against existing creditors, to the extent of the value of her dower right released: *Ward v. Crotty*, 4 Met. (Ky.) 59; *Alder etc. Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877; *Darling v. Hanks* (Ky.), 42 S. W. 1130; *Wright v. Stanard*, 2 Brock. 311, Fed. Cas. No. 18,094; *Quarles v. Lacy*, 4 Munf. 251.

Property against which a creditor cannot enforce his claim is not, as to such creditor, the subject of a fraudulent conveyance. And since the dower interest of a wife is not, as a rule, subject to be extinguished for a husband's debts, a conveyance in consideration of a release of this interest is not fraudulent: *Isgrigg v. Pauley*, 148 Ind. 436, 47 N. E. 821; at least to the extent of the value of the dower interest as already stated. And this is true, notwithstanding the husband's fraudulent intent: *Blanton v. Taylor*, Gilm. (Va.) 209. At law, it seems that such a conveyance is good, notwithstanding the property conveyed considerably exceeds the value of the dower right released: *Wright v. Stanard*, 2 Brock. 311, Fed. Cas. No. 18,094. While in equity the conveyance will only be sustained to the extent of the value of the dower released: *Wright v. Stanard*, 2 Brock. 311, Fed. Cas. No. 18,094; if the excess above the value of the dower interest is fraudulent: *Darling v. Hanks* (Ky.), 42 S. W. 1130. And the conveyance will be set aside as to the excess in value of the property over the dower relinquished: *Taylor v. Moore*, 2 Rand. 563; *Johnston v. Gill*, 27 Gratt. 587.

There may be such a disproportion between the estate conveyed to a wife and her dower interest as to discredit the integrity of the transfer: *Smith v. Seiberling*, 35 Fed. 677. Such a state of facts appears to have existed in *First Nat. Bank v. Cummins*, 38 N. J. Eq. 191, and *Commonwealth etc. Trust Co. v. Brown*, 166 Pa. St. 477, 31 Atl. 205. Also in *Gordon etc. Co. v. Tweedy*, 71 Ala. 202, where the conveyance was deemed constructively fraudulent. In *Garvey v. Moore*, 12 Ky. Law Rep. 732, 15 S. W. 136, the wife having acted in good faith and honestly, a conveyance to her was protected to the extent of the actual value of her dower interest. No consideration is shown, and the conveyance is fraudulent and void, where a wife, releasing her dower, joins in a voluntary conveyance to a third person, who immediately reconveys to the husband and wife as tenants by entireties. Any interest the wife held in such land was by the transaction merely increased to a larger interest: *Phillips v. Kennedy*, 139 Ind. 419, 38 N. E. 410, 39 N. E. 147.

C. Conveyance Subsequent to Release.—The fact that a wife releases her dower right some time previous to a conveyance to her will not of itself render the conveyance void, where she refused to release such right unless she was reimbursed therefor, and the promise to pay her furnished the consideration for the transfer, and no actual

fraudulent intent existed: *Sedgwick v. Tucker*, 90 Ind. 271. Such a consideration is good as to existing creditors to the extent of the value of the dower interest released: *Smart v. Haring*, 14 Hun, 276.

And this is true, though the conveyance was made after the husband became financially embarrassed: *Holmes v. Winchester*, 133 Mass. 140; *Sedgwick v. Tucker*, 90 Ind. 271. But if the wife has already relinquished her dower right, a subsequent conveyance, in consideration of such act previously done, would be voluntary as to existing creditors: *Woodson v. Pool*, 19 Mo. 340.

D. Release Subsequent to Conveyance.—The fact that a wife released her dower interest subsequent to a conveyance for her benefit does not invalidate the conveyance, where such release was intended at all times as the consideration for the conveyance: *United States Bank v. Lee*, 13 Pet. 107.

E. Effect as to Subsequent Creditors.—The release by a wife of her right of dower is a good consideration for a conveyance as against subsequent creditors of the husband: *Ward v. Crotty*, 4 Met. (Ky.) 59. And the property conveyed is free from the claims of subsequent creditors, though it exceeds the value of the dower right released: *Johnston v. Gill*, 27 Gratt. 587. And though the conveyance was not made until several years after the right of dower was released, the husband not being in debt, when the agreement to convey was made and the dower was released: *Payne v. Hutcheson*, 32 Gratt. 812.

4. Release of Homestead Right.—The release by a wife of her right in a homestead is a good consideration for money paid to her, or a conveyance made to her: *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3; *Burnham etc. Co. v. McMichael*, 6 Tex. Civ. App. 496, 26 S. W. 887; *Novelty Mfg. Co. v. Pratt*, 21 Mo. App. 171.

Though in Wisconsin it is not a sufficient consideration where the release is made directly to the husband: *Le Sauler v. Krueger*, 85 Wis. 219, 54 N. W. 774. At law the conveyance is good for the whole property conveyed, notwithstanding it is in excess of the property released. But in equity it would be good only to the value of the property ceded by the wife, if the husband was insolvent at the time: *Novelty Mfg. Co. v. Pratt*, 21 Mo. App. 171.

In states where the homestead is exempt from execution, a transfer thereof to the wife will be sustained as against creditors, if the right to such homestead exemption has not been forfeited: *Murphy v. Farquhar*, 39 Fla. 350, 22 South. 681. The rule is the same, although the purpose of the conveyance may have been to defraud the husband's creditors: *Mundt v. Hagedorn*, 49 Neb. 409, 68 N. W. 610. For there can be no fraud in conveying property exempt from execution, since the creditor is not thereby deprived of any right: *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561. Hence, a gift of a life insurance policy to one's wife, not in excess of a homestead exemption, is valid: *Barron v. Williams*, 58 S. C. 280, 79 Am.

St. Rep. 840, 36 S. E. 561. The fact that crops on homestead land may be subject to a husband's debts will not render a conveyance of the homestead fraudulent as to creditors of the husband who are thereby prevented from reaching subsequent crops raised on the land, for such crops not yet planted or grown have no value in the law: *Olson v. O'Connor*, 9 N. Dak. 504, 81 Am. St. Rep. 595, 84 N. W. 359.

5. **Property Exempt from Execution.**—A husband may convey to his wife property exempt from execution: *Vinton v. Filts*, 71 Ill. App. 630; *Marmion v. White*, 151 Ind. 445, 51 N. E. 930. And the conveyance may be by way of a gift: *Bailey v. Littell*, 24 Nev. 294, 53 Pac. 308. For a gift of such property cannot be a fraud upon creditors, for the reason that creditors are not thereby deprived of any right or impeded in the enforcement of it: *Barron v. Williams*, 58 S. C. 280, 79 Am. St. Rep. 840, 36 S. E. 561.

6. **Assumption of Husband's Debts.**—Whether the assumption by a wife of certain debts of her husband will constitute a sufficient consideration for a conveyance to her will depend upon the circumstances surrounding the transaction. Where a wife gave a note to a third person in good faith, in payment of a debt of her husband to such third party, a mortgage to the wife in consideration of this assumption of liability on her part was held to be good as against creditors to the extent of the debt: *McAfee v. McAfee*, 28 S. C. 188, 5 S. E. 480. So a conveyance to a wife of property charged with liens upon consideration, that she discharge the liens, has been sustained, where the wife owned a separate estate: *Wood v. Harrison*, 41 W. Va. 376, 23 S. E. 560. But a conveyance to a wife upon a mere consideration that she pay her husband's debts has been held sufficient to sustain a finding that the conveyance was fraudulent in fact, since such conveyance may have been intended to give her an advantage as to the time of making payment, and thus hinder and delay creditors: *Threlkel v. Scott* (Cal.), 34 Pac. 851. So a conveyance in consideration of the wife's paying certain preferred debts and maintain the husband during his life is fraudulent as to creditors not provided for, where the husband retains nothing with which to satisfy such debts, and the value of the property conveyed is much more than the amount of the debts preferred: *Park v. Battey*, 80 Ga. 353, 5 S. E. 492.

7. Property in Husband by Virtue of Marriage.

A. **As Consideration for Conveyance.**—Attention has already been called, in speaking of postnuptial settlements, to the common-law rule that the personal property of a wife became the absolute property of the husband either at marriage, or when reduced to possession, and that a deed made thereafter in consideration of such property received by the husband would be voluntary, and could be attacked by pre-existing creditors the same as any other voluntary conveyance. Upon this point, in addition to cases already noticed, may be cited

the following: *Jeffrey v. McGough*, 83 Ala. 202, 3 South. 594; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545; *Garvey v. Moore*, 12 Ky. Law Rep. 732, 15 S. W. 136; *Peirce v. Thompson*, 17 Pick. 391; *Joiner v. Franklin*, 12 Lea, 420; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615; *Clarke v. King*, 34 W. Va. 631, 12 S. E. 715; *Howe v. Colby*, 19 Wis. 583; *American etc. Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 South. 751; *Suber v. Chandler*, 36 S. C. 344, 15 S. E. 426; *Gicker v. Martin*, 50 Pa. St. 138; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519.

This rule, however, only applies where the property which belonged to the wife has vested absolutely in the husband, and subsequent thereto, a conveyance is sought to be made, based upon such property as a supposedly valid consideration. Such consideration is not valuable, since the wife surrenders nothing to which she was in any way entitled, unless there was an antenuptial contract or agreement prior to reducing her property to possession, to make a settlement upon her: *Lyne v. Bank of Kentucky*, 5 J. J. Marsh. 545. A husband has an absolute right to collect his wife's money, so her consent to allow him to do this cannot furnish a consideration for a conveyance: *Lee v. Hollister*, 5 Fed. 752.

Where a husband reduces to possession an interest in an estate descended to his wife, without resort to a court of equity, he acquires a complete legal title to it, and a subsequent conveyance for the benefit of his wife must be considered voluntary as against the rights or creditors: *Hurdt v. Courtenay*, 4 Met. (Ky.) 139; *American etc. Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 South. 751; *Davis v. Justice*, 14 Ky. Law Rep. 741, 21 S. W. 529.

If the husband is solvent and has sufficient property to pay all his debts, there can be no doubt as to his right to make a conveyance in consideration of his wife's property received by him, for although such a conveyance is voluntary, yet no creditors are or can be injured: See *Bridgford v. Riddell*, 55 Ill. 261; *Dick v. Hamilton*, Deady, 322, Fed. Cas. No. 3890; *Harvey v. Alexander*, 1 Rand. 219, 10 Am. Dec. 519; *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482.

Where a wife relinquishes an actual interest in her property, which was under her control, and which could only be alienated with her consent, there is, no doubt, sufficient consideration for a conveyance to her: *Pierce v. Thompson*, 17 Pick. 391.

The difficult question appears to be in cases of personal property, which the husband could reduce to his possession by virtue of the marriage relation, whether the husband can at the time of receiving such property promise to make a settlement upon or conveyance to the wife, which, when executed, will be valid as against creditors. There are intimations that a husband cannot promise to treat his wife's personalty as her separate estate as against the rights of pre-existing creditors: See *Bridgford v. Riddell*, 55 Ill. 261. And, in North Carolina, the rule became firmly established that a wife had no right to have a provision made for her out of a distributive share accruing to her during coverture: *Allen v. Allen*, 41 N. C. 293, citing

earlier cases. But this case as clearly recognized that a different rule prevailed both in England and in most of the United States. And we believe the rule prior to the married women's acts was generally recognized to be that at least so far as property which had not been reduced to possession was concerned, the husband was not obliged to assert his marital rights therein. And if at the time he reduced such property to his possession, he promised to pay the wife therefor or to hold the property in trust for her as her separate estate, this might be done, and a subsequent conveyance in accordance with such promise would be sustained in equity: See *Gicker v. Martin*, 50 Pa. St. 138; *White v. Clasby*, 101 Mo. 162, 14 S. W. 180; *Botts v. Gooch*, 97 Mo. 88, 10 Am. St. Rep. 286, 11 S. W. 42; *Wingerd v. Fallon*, 95 Pa. St. 184; *Woodworth v. Sweet*, 51 N. Y. 8; *Jaycox v. Caldwell*, 51 N. Y. 395; *Dresser v. Zabriskie* (N. J.), 39 Atl. 1066; *Drury v. Briscoe*, 42 Md. 154; *Bradford v. Goldsborough*, 15 Ala. 311.

The conveyance would be good as to all creditors whose rights accrued subsequent to the agreement, although the conveyance was not made until the husband had become insolvent: See *Woodworth v. Sweet*, 44 Barb. 268, affirmed in 51 N. Y. 8; *Jaycox v. Caldwell*, 37 How. Pr. 240, affirmed, 51 N. Y. 395.

This right of the wife to have her personal property recognized as her separate estate, and the recognition by a court of equity of an agreement on the part of the husband to treat such property as still that of his wife, appears to have been applied only to property, for the recovery of which it was necessary for the husband to come into equity. And when he did come into equity, the court might require him to make a suitable provision for his wife before granting a recovery: *Jaycox v. Caldwell*, 37 How. Pr. 240; *Drury v. Briscoe*, 42 Md. 154; *Bradford v. Goldsborough*, 15 Ala. 311. "The rule on the subject of the wife's equity to a settlement," as stated in *Bouknight v. Epting*, 11 S. C. 77, "is, that whenever the wife's property is under the jurisdiction of the court of chancery, in such a manner that it requires a decree or order of court to put a party rightfully into possession of it, the court will not deliver it over except upon terms of a settlement being made, unless the wife has been sufficiently provided for out of other property, or unless the wife, upon a private examination, shall waive her right to such settlement." And where a court of equity would have ordered a settlement, it will sanction and sustain a settlement voluntarily made between the parties: *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. 619. In *Jaycox v. Caldwell*, 37 How. Pr. 240, it was said that this restriction upon the jurisdiction of a court of equity has been exploded, and the wife has been permitted actively to assert her equity. This is, perhaps, true, so far as the necessity of going into equity is concerned, and apparently is true for all purposes in New York: See *Jaycox v. Caldwell*, 51 N. Y. 395; *Woodworth v. Sweet*, 44 Barb. 268, affirmed in 51 N. Y. 8.

The questions involved in cases of this character have mainly lost their importance by reason of the numerous married women's acts, under which a married woman is allowed to retain her personal property as her own separate estate, and if it comes into the possession of the husband, it is presumed that he acquires it as a loan from his wife, and not as a gift. Certainly, if he agrees to reimburse his wife for such personal property which he may use, the agreement is valid and a conveyance in accordance therewith will be good as against creditors. See, by way of illustration, *Sperry v. Haslam*, 57 Ga. 412; *Comer & Co. v. Allen*, 72 Ga. 1.

B. Where Property not Reduced to Possession.—It would seem from principle that personal property received by a husband from his wife by virtue of the marriage would constitute a sufficient consideration for a conveyance to the wife only when such property had not been reduced to the husband's possession, and some act was necessary upon his part before he became entitled to its use. And this for the reason that as to other personal property in the possession of the wife at the time of the marriage it became vested immediately and absolutely in the husband. In New York, however, there appears to be no distinction recognized between personal property in the possession of the wife at the time of the marriage, and property (such as choses in action) which the husband is obliged to reduce to his possession before he realizes any beneficial interest in it: See *Jaycox v. Caldwell*, 51 N. Y. 395. And in some other states, as well, a husband is admitted to have the right to treat his wife's money as her own, and to decline to assert his marital right thereto, unless this would actually defraud creditors: *McCandless v. Rea*, 21 Ky. Law Rep. 1687, 56 S. W. 10. But elsewhere the distinction seems to have been recognized, that if the wife's choses in action have not yet been reduced to possession by the husband, his marital rights have not yet attached, and if he then makes an agreement to convey to the wife, or make a settlement upon her in consideration of such property received by him, the agreement is based upon a sufficient consideration, and a subsequent conveyance in accordance therewith is not voluntary and will be upheld as against creditors: See *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. 619; *Drury v. Briscoe*, 42 Md. 164; *Bradford v. Goldsborough*, 15 Ala. 311; *Cox v. Scott*, 9 Baxt. 305.

C. Property Received Years Before.—Where there is no antenuptial agreement, and no promise to make a settlement previous to reducing a wife's estate to his possession, a husband cannot make a conveyance to her years after he has received her personal property, so as to render it valid as against creditors, since there is no consideration therefor: *Lyne v. Bank*, 5 J. J. Marsh. 545; *Anderson v. Anderson*, 80 Ky. 638; *Tapp v. Todd*, 16 Ky. Law Rep. 382, 28 S. W. 147; *Smock v. Jones* (N. J.), 11 Atl. 497; *Taylor v. Dawes* (N. J.), 13 Atl. 593; *Luers v. Brunges*, 34 N. J. Eq. 19; *Wylie v. Basil*, 4 Md. Ch. 327; *Benne v. Schnecko*, 100 Mo. 250, 13 S. W. 82; *Warren v. Ranney*, 50 Vt. 653.

The mere lapse of time during which the property was always treated as belonging to the husband, and nothing was said to intimate that the wife had any beneficial interest therein, is of itself important as indicating that the conveyance was not made in good faith: *Anderson v. Anderson*, 80 Ky. 638; *Bank v. Winn*, 132 Mo. 80, 33 S. W. 457. Indeed, it is said in some cases, that even if the husband did take his wife's money under an agreement to hold it in trust for her, this will not sustain a conveyance years afterward which prejudices the rights of creditors: *Tapp v. Todd* (Ky.), 28 S. W. 147; *Smock v. Jones* (N. J.), 11 Atl. 497.

But where the wife inherits money, which comes into the possession of the husband under a trust to hold and invest for the wife, this is a sufficient consideration for a subsequent conveyance to the wife: *Bank v. Winn*, 132 Mo. 80, 33 S. W. 457. And see *Jones v. Brandt*, 59 Iowa, 332, 10 N. W. 854, 13 N. W. 310. And where money of the wife was received by the husband for a definite purpose, upon a distinct promise, often repeated subsequently, that he would hold the property as his wife's separate estate, a later conveyance may be upheld: *Smock v. Jones* (N. J.), 11 Atl. 497, commenting upon *Yeomans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631.

1. Pre-existing Liability as Consideration.

1. *Conveyance in Execution of Prior Agreement.*—A conveyance in execution of a prior agreement between husband and wife is not per se fraudulent: *McCandless v. Rea*, 21 Ky. Law Rep. 1687, 56 S. W. 10. There can be no doubt of the general right of a husband to make a conveyance to his wife or to a third person for her benefit, where such conveyance is in accordance with a prior agreement based upon a sufficient and adequate consideration, even though the effect may be to hinder or delay other creditors in the collection of their claims: See *Sprague etc. Co. v. Benson*, 101 Iowa, 678, 70 N. W. 731; *Probert v. Soujn*, 110 Wis. 181, 85 N. W. 647; *Ullman v. Thomas*, 126 Mich. 61, 85 N. W. 245; *Ready v. Bragg*, 1 Head, 511; *Stockett v. Holliday*, 9 Md. 480; *Rockford Boot etc. Co. v. Mastin*, 75 Iowa, 112, 39 N. W. 219.

So a husband may pay interest on a mortgage on his wife's land, in lieu of rent, where the family occupy such property: *Odell v. Mylins*, 53 How. Pr. 250. And land held in trust for a wife may be transferred to her without committing a fraud upon creditors: *De Berry v. Wheeler*, 128 Mo. 84, 49 Am. St. Rep. 538, 30 S. W. 338. A husband may act as his wife's agent in purchasing land with her means; and if he takes the deed in his name, he may destroy such deed and have the grantor make a new one to his wife: *Ready v. Bragg*, 1 Head, 511. So may he join in a conveyance for the benefit of his wife, in order to correct a mistake and clear up her title: *Brommerman v. Jennings*, 101 Ind. 253; *Fitzpatrick v. Burchill*, 7 Misc. Rep. 463, 28 N. Y. Supp. 389. But a husband cannot withhold a voluntary deed from record, and then after he becomes insolvent

make another deed to correct the first deed: *Talcott v. Levy*, 29 Abb. N. C. 3, 20 N. Y. Supp. 440.

The fact that many years have passed since the agreement between husband and wife was made will not prevent the conveyance from being valid, if the agreement was made in good faith and the subsequent conveyance was in pursuance of repeated promises to perform the early agreement: *Ullman v. Thomas*, 126 Mich. 61, 83 N. W. 245. But there must be good faith in the transaction. And the fact that the transaction was between husband and wife, and that the conveyance was in pursuance of a prior agreement will warrant and demand increased vigilance in sifting the good faith of the transaction: *Ready v. Bragg*, 1 Head, 511. And secret parol agreements will not usually be upheld and enforced against creditors whose rights have intervened in ignorance of such agreements: *Hatch v. Gray*, 21 Iowa, 29. A mere promise on the part of the husband to reinvest her money for her benefit, which was not kept, and she acquiesced for twenty-eight years in his appropriation of it for his own benefit, will not sustain a conveyance made twenty-eight years after receiving her money: *Darling v. Hawks* (Ky.), 42 S. W. 1130. The former agreement in pursuance of which the conveyance is made must be an agreement founded upon a valuable consideration, as already observed. And a promise to pay a wife for the performance of the ordinary household duties of a wife is not a sufficient consideration, and a conveyance in pursuance thereof is voluntary: *Lee v. Savannah Guano Co.*, 99 Ga. 572, 59 Am. St. Rep. 243, 27 S. E. 159.

2. Payment of Pre-existing Debt.—Where it is clearly shown that a married woman holds a bona fide debt against her husband, she is entitled to the same legal rights as any other creditor, except as to remedy: *Righter v. Riley*, 42 W. Va. 633, 26 S. E. 357. And being entitled to the same legal rights as other creditors, a husband who owes his wife a valid debt may make a conveyance to her in payment thereof, even when he is insolvent: *Lassiter v. Hoes*, 11 Misc. Rep. 1, 31 N. Y. Supp. 850; *Dean v. Plane*, 96 Ill. App. 428; *Muir v. Miller*, 103 Iowa, 127, 72 N. W. 409; *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935; *Strauss v. Parshall*, 91 Mich. 475, 51 N. W. 1117; *First Nat. Bank v. Smith*, 93 Ala. 97, 9 South. 548; *First Nat. Bank v. McAllister*, 46 Mich. 397, 9 N. W. 446; *Jones v. Cannon*, 8 Houst. 1, 31 Atl. 521; *Thomas v. Mueller*, 106 Ill. 36; *Cornell v. Gibson*, 114 Ind. 144, 5 Am. St. Rep. 605, 16 N. E. 130; *McCrory v. Lutz*, 94 Tex. 650, 64 S. W. 780; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926; *Sims v. Tidwell*, 98 Ga. 686, 25 S. E. 555; *Neighbor v. Hobliteal*, 84 Iowa, 598, 51 N. W. 53; *Leonard v. Smith*, 34 W. Va. 442, 12 S. E. 479; *Barclay v. Plant*, 50 Ala. 509; *Mayfield Woolen Mills v. Wilson*, 87 Mo. App. 146; *Riley v. Vaughan*, 116 Mo. 169, 38 Am. St. Rep. 586, 22 S. W. 707.

Such a conveyance cannot be deemed in fraud of the rights of creditors: *Dean v. Plane*, 96 Ill. App. 428. Especially is this considered

true since the married women's acts, a conveyance not being considered even a badge of fraud if there exists an honest debt between husband and wife: *McGee v. Wells*, 52 S. C. 472, 30 S. E. 602; for a wife has a right to secure the payment of her just claim against her husband, however much it may hinder or delay other creditors: *Muir v. Miller*, 103 Iowa, 127, 72 N. W. 409. And a conveyance of land to a wife in payment of a valid debt owing to her by her husband is neither voluntary nor in fraud of creditors: *Meigs v. Dibble*, 73 Mich. 101, 40 N. W. 935.

Even a conveyance in payment of a debt which a husband could not be compelled to pay is not voluntary: *Poynter v. Mallory*, 20 Ky. Law Rep. 284, 45 S. W. 1042; and this fact will not invalidate the conveyance: *Spence v. Repass*, 94 Va. 716, 27 S. E. 583.

Transactions between husband and wife are to be closely scrutinized, however, and the actual existence of a debt must be clearly shown: *Booher v. Worill*, 57 Ga. 235. But where a real indebtedness is shown, the conveyance will be held valid, unless the consideration is so out of proportion to the value of the property as to render the conveyance a fraud in law: *Strauss v. Parshall*, 91 Mich. 475, 51 N. W. 1117. The debt must not be simulated, however. It must be real. A husband cannot make a conveyance for a debt already paid: *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652. Ordinarily, a simulated increase of indebtedness, by including fictitious claims, will avoid a conveyance. But this will not result if the actual indebtedness, after deducting the fictitious increase, still equals or exceeds the value of the property conveyed: *First Nat. Bank v. Smith*, 93 Ala. 97, 9 South. 548.

Where the debt is evidenced merely by a parol promise, it will be valid in equity: *Schaffner v. Reuter*, 37 Barb. 44.

The transfer to the wife may be made in various ways, and if in payment of a bona fide debt, it will be upheld as against creditors. For example, a husband who has purchased land, may surrender his deed to the grantor, and take a new deed in the name of his wife: *First Nat. Bank v. McAllister*, 46 Mich. 397, 9 N. W. 446. Or he may make an original purchase in the name of his wife: *Jones v. Cannon*, 8 Houst. 1, 31 Atl. 521. So a judgment may be confessed to the wife: *Thomas v. Mueller*, 106 Ill. 36.

Naturally, such a conveyance can be made if the husband retains enough property to pay all his debts: *Hume etc. Co. v. Condon*, 44 W. Va. 553, 30 S. E. 56. But the retention of property is not necessary. Indeed, he may be insolvent, and yet the conveyance is valid if no more property is transferred than is reasonably necessary to secure or pay the debt: *McCrory v. Lutz*, 94 Tex. 650, 64 S. W. 780. And the fact that she knew of her husband's insolvency will not vitiate the transaction, unless she participates in her husband's fraudulent intent: *Mayfield Woolen Mills v. Wilson*, 87 Mo. App. 145. If the prior debt is valid, a conveyance is good, notwithstanding a fraud-

ulent intent on the part of the husband, if the wife did not participate in such intent: *Riley v. Vaughan*, 116 Mo. 169, 38 Am. St. Rep. 586, 22 S. W. 707; *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753, 54 N. W. 926. And where the husband takes title in his own name to property purchased with the corpus of the wife's separate estate, a subsequent conveyance will be sustained, though both husband and wife intended by so doing to keep such property away from the husband's creditors: *Beddow v. Sheppard*, 118 Ala. 474, 23 South. 662. A conveyance to a wife before going into a hazardous business is not fraudulent as to subsequent creditors where the husband is in debt to his wife: *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946. The fact that a husband manages his wife's separate property as if it belonged to him will not affect her title so far as his creditors are concerned: *Second Nat. Bank v. Merrill*, 81 Wis. 151, 29 Am. St. Rep. 877, 50 N. W. 505.

3. What Constitutes Debt to Wife.—A husband and wife may mutually agree as to how their acquisitions shall be divided, and a subsequent conveyance in accordance with such agreement is good: *Hyde v. Powell*, 47 Mich. 156, 10 N. W. 181. A loan by a wife to her husband of her own separate money, creates a valid indebtedness, the payment of which is not a fraud upon creditors: *Monroe v. May*, 9 Kan. 466. And a conveyance in payment of such indebtedness is valid: *Lyne v. Wann*, 72 Ala. 43; *Savage v. O'Neil*, 44 N. Y. 298; *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756; *Schuberth v. Schillo*, 177 Ill. 346, 52 N. E. 319.

A husband becomes his wife's debtor by receiving moneys belonging to her statutory estate, and converting them to his own use: *Lyne v. Wann*, 72 Ala. 43; also by the performance of extra labor by the wife in cooking for hired hands of her husband, under a promise to that effect, where by statute the wages of a wife are free from her husband's debts: *Falkenburg v. Johnson*, 19 Ky. Law Rep. 1606, 44 S. W. 80. And by using the proceeds of a note given to a wife by her father as an advancement to her: *Rogers v. Mayer*, 59 Miss. 524. But the mere fact that a wife, whose father sent her a note against her husband, destroyed such note, does not show that her husband thereby became indebted to her: *Meredith v. Citizens' Nat. Bank*, 92 Ind. 343.

Money received by a husband from his wife, and used for the support of both, there being no understanding that the wife should be repaid, does not show a debt due the wife: *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *Carbiener v. Montgomery*, 97 Iowa, 659, 66 N. W. 900; *Clift v. Moses*, 75 Hun, 517, 27 N. Y. Supp. 728. And the mere fact that the husband receives money from his wife, where there is no promise to repay the wife, does not raise an implied promise which will support a claim against her husband: *Grover etc. Mach. Co. v. Radcliff*, 63 Md. 496; *Kuhn v. Stansfield*, 28 Md. 210, 92 Am. Dec. 681. And while these cases indicate that there must be an express promise to repay on the part of the husband, or no debt is

shown, yet the better rule is, we think, that the circumstances attending the receipt of the money may be such as to prove that they dealt with each other as debtor and creditor, even in the absence of any express promise to repay the wife. If such is the case, a debt is established: *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756. In Michigan it is held that when a wife advances money to her husband, the law will imply a promise to repay, the same as if they were strangers: *Sykes v. City Sav. Bank*, 115 Mich. 321, 69 Am. St. Rep. 562, 73 N. W. 369. But the courts of most of the states are not as liberal as Michigan in implying a promise on the part of the husband to repay his wife, especially where the husband has used the money in his business for some length of time, or for the family support, and there is nothing to show a promise upon his part to repay the money or treat it as a loan. And conveyances, where no debt is clearly established, may be avoided by creditors: See *Tyler v. Budd*, 96 Iowa, 29, 64 N. W. 679; *Hanson v. Manley*, 72 Iowa, 48, 33 N. W. 357; *Iseminger v. Criswell*, 98 Iowa, 382, 67 N. W. 289; *Hubbard v. Little* (N. J.), 10 Atl. 839. Where the claim of the wife was first put in writing when her husband began to fail in business, this casts suspicion upon the good faith and genuineness of the claim: *Post v. Stiger*, 29 N. J. Eq. 554. The rate of interest alleged to have been charged by the wife, and the length of time the debt has run, may be considered in determining the good faith of a conveyance to the wife for a pre-existing debt: *Hollis v. Rodgers etc. Co.* 106 Ga. 13, 31 S. E. 783. The receipt of money which was the husband's by virtue of the marriage relation is not a good pre-existing debt as a rule: *Bayne v. State*, 62 Md. 100. See a discussion of this subject elsewhere. And a husband cannot convey property to his wife in payment of ordinary household services, as against existing creditors: *Conger v. Corey*, 39 App. Div. 241, 57 N. Y. Supp. 236. Where no agreement to repay a wife for small sums of money received from her from time to time is made until after such claims are barred by the statute of limitations, such alleged pre-existing debts do not form a sufficient consideration for a conveyance, as against the rights of creditors: *Coale v. Moline Plow Co.*, 134 Ill. 350, 25 N. E. 1016; *Schuberth v. Schillo*, 177 Ill. 346, 52 N. E. 319. And where the husband has for years treated property as his own, without attempting to pay his alleged debt to his wife, or to secure her for it until he is sued on a large claim, and then a conveyance is made without ascertaining the amount due, and the circumstances show an intent to place the property beyond the reach of creditors, there is no bona fide debt to sustain the conveyance: *Christie v. Bridgman*, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429. There must be something to show a loan to the husband, or that the parties intended to occupy the relation of debtor and creditor: *New South Bldg. etc. Assn. v. Reed*, 96 Va. 345, 31 S. E. 514. And the fact that the money of the wife was advanced years before, and no note or other obligation was ever given, and the husband never recognized his liability to his wife, and she never expected,

until her husband became insolvent, to have the money refunded, is insufficient to establish that the money was hers, or that the conveyance was in good faith and made for an adequate consideration: *Wood v. Pebbles* (Ala.), 25 South. 723; *Township v. Foley*, 113 Mich. 622, 71 N. W. 1086; *Fleischner v. Bank*, 36 Or. 553, 54 Pac. 884, 60 Pac. 603, 61 Pac. 345; *Dillman v. Nadelhoffer*, 162 Ill. 625, 45 N. E. 680; *British etc. Mortgage Co. v. Norton*, 125 Ala. 522, 28 South. 31; *Luers v. Brunges*, 34 N. J. Eq. 19; *Witz etc. Co. v. Osburn*, 83 Va. 227, 2 S. E. 33; *Porter v. Goble & Co.*, 83 Iowa, 565, 55 N. W. 530; *Peninsular Stove Co. v. Roark*, 94 Iowa, 560, 63 N. W. 326; *Maxwell v. Hanshaw*, 24 W. Va. 405; *La Saulnier v. Krueger*, 85 Wis. 214, 54 N. W. 774; *Wake v. Griffin*, 9 Neb. 47, 2 N. W. 461. The debt of the wife must be in fact the inducing cause of the conveyance. An alleged debt cannot be resurrected solely for the occasion: *Moore v. Orman*, 56 Iowa, 39, 8 N. W. 689. And even if a husband promised to use the wife's money in buying a home for her, yet if she acquiesces in his using the money to buy merchandise for his business, he cannot, after contracting debts, sell the merchandise and buy property in her name, as against the rights of intervening creditors: *Clay v. Trimble*, 13 Ky. Law Rep. 61, 16 S. W. 83.

If a wife is a bona fide creditor of her husband, and there is clear proof of the validity of the debt, a conveyance to her in payment of her debt in preference to other creditors is valid, and this is true though the statute of limitations may have run against such debt: *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606; *French v. Motley*, 63 Me. 326; *Brigham v. Fawcett*, 42 Mich. 542, 4 N. W. 272; *McConnell v. Barber*, 86 Hun, 360, 33 N. Y. Supp. 480.

4. **Gift to Husband.**—If the money of the wife has been placed in the husband's hands as a gift, he will not be permitted to give it back to her when he becomes insolvent, as against his creditors. And a conveyance to accomplish such a purpose is voluntary and fraudulent as to creditors: *Bailey v. Kansas Mfg. Co.*, 32 Kan. 73, 3 Pac. 756; *Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453; *Hoffman v. Henderson*, 145 Ind. 613, 44 N. E. 629; *Stacker v. Wilson* (Tenn.), 52 S. W. 709; *McGinnis v. Curry*, 13 W. Va. 29. And so of money given to a wife by her husband when he is in debt, if it is used to purchase property in the name of the wife, such property may be reached by his creditors: *Beatty v. Thompson*, 23 Ky. Law Rep. 1850, 66 S. W. 384.

It has been held that where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift: *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; unless there was a promise to repay: *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1. And no subsequent agreement can make it a loan if it was originally a gift: *Flynn v. Jackson*, 93 Va. 341, 25 S. E. 1. The presumption of a gift is not rebutted by showing a private parol

understanding between husband and wife: *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871. There is no presumption of a gift, however, where a mortgage is executed in consideration of the money received from the wife: *Cole v. Lee*, 45 N. J. Eq. 779, 18 Atl. 854. And the giving of notes soon after the money was received tends to repel the presumption of a gift: *Grabill v. Moyer*, 45 Pa. St. 530. Under the modern married women's acts, there is raised no presumption of a gift merely from the fact that the husband has received possession of his wife's money: See *Grabill v. Moyer*, 45 Pa. St. 530. Indeed, the mere fact of the reception of a wife's money by her husband makes him her debtor, and it requires no affirmative proof that he received it as a loan, and not as a gift: *Hawley v. Griffith*, 187 Pa. St. 306, 41 Atl. 30; *Hauer's Estate*, 140 Pa. St. 420; *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. Rep. 677; and the principal case. And, as previously seen, an express promise is unnecessary to establish a debt between husband and wife.

5. Money Loaned to Husband.—There is nothing to prevent a wife from making a loan of her separate money to her husband. Under most of the married women's acts the money which a wife has at the time of her marriage, and that which she acquires subsequently, is her separate property, and this she may loan to her husband. At common law the personal property which a woman had at the time of her marriage vested in the husband absolutely. And we have previously discussed the question when such personal property, when received by the husband, may be a sufficient consideration for a conveyance to her which will be valid as to creditors. Both at common law and under the married women's acts, when a wife did make a real and valid loan of her separate money to her husband, it constituted a valuable consideration for a subsequent conveyance to the wife, and is such a pre-existing liability as will sustain such a conveyance as against creditors: See *Kyger v. Hull Skirt Co.*, 34 Ind. 249; *Hogan v. Robinson*, 94 Ind. 138; *Citizens' Nat. Bank v. Webster*, 76 Iowa, 381, 41 N. W. 47; *Shyroek v. Latimer*, 57 Tex. 674; *Blackmore v. Crutcher* (Tenn.), 46 S. W. 310; *In re Jamison's Estate*, 183 Pa. St. 219, 38 Atl. 604; *Latimer v. Glenn*, 2 Bush, 535; *Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16; *Roberts v. Burr*, 135 Cal. 156, 67 Pac. 46.

A wife having loaned her money may enforce her claim the same as any other creditor: *Citizens' Nat. Bank v. Webster*, 76 Iowa, 381, 41 N. W. 47. And a conveyance received by her in payment of her claim is not fraudulent as to other creditors: *Taylor v. Cooley*, 20 Ky. Law Rep. 1365, 49 S. W. 335, since it is founded upon a valuable and sufficient consideration, and is therefore not voluntary: *Atlantic Nat. Bank v. Tavener*, 130 Mass. 407. If a note is given to a wife for a loan of money by her, a subsequent conveyance in payment of the note is valid: *Randall v. Lunt*, 51 Me. 246. And the note itself is a legitimate claim against her husband: *First Nat. Bank v. Parsons*, 42 W. Va. 137, 24 S. E. 554. A husband who gives money to

his wife while solvent may later receive such money from her as a loan, so that a conveyance in payment of such loan would be valid as against creditors: *Dillen v. Johnson*, 132 Ind. 75, 30 N. E. 786.

Where the effect of a conveyance in payment of an alleged loan is to deprive creditors of their opportunity to enforce their claims, the validity of the loan must be established, and the transaction will be viewed with suspicion until this is shown: *Lipsecomb v. Lyon*, 19 Neb. 511, 27 N. W. 731. If the loan was made in good faith it will sustain a conveyance in payment thereof, although made a number of years later: *Fulp v. Beaver*, 136 Ind. 319, 36 N. E. 250; *Parker v. Barkenowitz*, 116 Mich. 58, 74 N. W. 290. The mere fact that the wife did not disclose to the public that she had made a loan to her husband does not establish fraud on the part of the wife: *Robinson v. Stevens*, 93 Ga. 535, 21 S. E. 96. A conveyance to the wife will be sustained to the extent of the actual consideration; that is, to the extent of the amount of money loaned to the husband with interest: *McQuown v. Law*, 18 Ill. App. 34.

6. Security for Money Loaned.—A husband may give a mortgage to his wife to secure her for money loaned to him: *Peck Bros. & Co. v. Lincoln*, 76 Iowa, 424, 41 N. W. 61; *Cole v. Lee*, 45 N. J. Eq. 779, 18 Atl. 854; *Ocean Nat. Bank v. Hodges*, 9 Hun, 161; *Drew v. Corliss*, 65 Vt. 650, 27 Atl. 613; *Gerald v. Gerald*, 28 S. C. 442, 6 S. E. 290. Such a mortgage may be given after the loan is made: *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; and after the husband has become insolvent to the knowledge of the wife: *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235; *Hitesman v. Donnel*, 40 Ohio St. 287; if there is no intent on the part of both to defraud other creditors: *Gerald v. Gerald*, 28 S. C. 442, 6 S. E. 290.

So an insolvent debtor may confess a judgment in favor of his wife, to secure her for money loaned to him by her out of her separate estate: *Meekley's Appeal*, 102 Pa. St. 536; *Hawley v. Griffith*, 187 Pa. St. 306, 41 Atl. 30.

7. Use of Wife's Separate Property.

A. Corpus of Estate.—We have noticed, under the heading, "Gift to Husband," that at least at common law there was a presumption that money received by a husband from his wife was received as a gift, and not as a loan. Indeed, prior to any changes in the common law, any money or other personal property which the wife had at the time of her marriage, or which she subsequently acquired, became her husband's absolutely upon his reducing it to his possession: *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652. Such personal property was not, at common law, the wife's separate estate. This rule, however, did not apply to the receipt of the corpus of a wife's separate estate. And, as clearly pointed out by the principal case, the presumption of law is against a gift by the wife of the principal of her separate property to the husband. And the receipt and appropriation by the husband of the corpus of his wife's separate es-

tate will furnish a good consideration for a subsequent conveyance to her in payment thereof, even as against creditors: *Vincent v. State*, 74 Ala. 274; *Rowland v. Plummer*, 50 Ala. 182; *Thompson v. Mills*, 39 Ind. 528; *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652; *Hawley v. Griffith*, 187 Pa. St. 306, 41 Atl. 30; *In re Hauer's Estate*, 140 Pa. St. 420, 23 Am. St. Rep. 245, 21 Atl. 445. Having converted the wife's statutory separate estate, the husband becomes indebted to her and may secure such debt by a mortgage: *Northington v. Faber*, 52 Ala. 45. It seems that a wife may lose her separate estate by allowing her husband to use it for himself, invest it in his own name, and this state of facts continues for years, without any promise on the part of the husband to repay the wife: *Rosenbaum v. Davis* (Tenn.), 48 S. W. 706.

B. Income of Estate.—The cases draw a clear distinction between the receipt by a husband of the principal of his wife's separate estate and the receipt of the income. The doctrine of the principal case is the rule of the authorities generally, viz., that a gift of the income from the wife's separate property may be implied from its receipt by the husband. Consequently, a conveyance of property by him to his wife, the consideration of which is such income received and used by him, is voluntary, and void as against existing creditors: *Early v. Owens*, 68 Ala. 171; *Wing v. Roswald*, 74 Ala. 346; *Gilkey v. Pollock & Co.*, 82 Ala. 503, 3 South. 99; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745; *Vincent v. State*, 74 Ala. 274; *Jones v. Davenport*, 44 N. J. Eq. 33, 13 Atl. 652; *Rine v. Hall*, 187 Pa. St. 264, 40 Atl. 1088; *Hawley v. Griffith*, 187 Pa. St. 306, 41 Atl. 30; *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. Rep. 677. The reason for the distinction between principal and income will be found ably and clearly stated in *McGlinsey's Appeal*, 14 Serg. & R. 64, as well as in the principal case.

The mere receipt and use of the rents and profits of a wife's separate estate do not create such a debt or liability as will support a conveyance to the wife, as against his creditors: *Bolling v. Jones*, 67 Ala. 508. But if the husband allows his wife to receive and use the income of her estate, and property is purchased in her name, the conveyance cannot be impeached as fraudulent, where the income of the wife's separate estate is not subject to the claims of his creditors: *Long v. Efurd*, 86 Ala. 267, 5 South. 482. And a husband may receive the income of his wife's separate estate under a promise to invest it for her benefit, in which case there will be a valid consideration for a subsequent conveyance to her, as against the claims of other creditors: *Tarsney v. Turner*, 48 Fed. 818; *Rine v. Hall*, 187 Pa. St. 264, 40 Atl. 1088.

8. Conveyance of Property in Excess of Debt.—The mere fact that the property conveyed to a wife is in excess of the debt due her will not invalidate the conveyance, where there is no such disparity in value as to affect her with notice of any fraudulent intent in the transfer: *De Prato v. Jester* (Ark.), 20 S. W. 807; *Bank v. Winn*,

132 Mo. 80, 33 S. W. 457; *Brigham v. Hubbard*, 115 Ind. 474, 17 N. E. 920. So where a wife in good faith takes a judgment from her husband for an amount which she believes to be due her, it will be valid as against creditors, though in excess of the amount actually due: *Howard Watch Co. v. Bedillion*, 131 Pa. St. 385, 18 Atl. 922, 923.

The conveyance of a large estate for a small debt is evidence of fraud, however: *Hord v. Rust*, 4 Bibb, 231. And where the alleged indebtedness is so disproportionate to the value of the land conveyed as to render the consideration grossly inadequate, and the conveyance was for the purpose of avoiding the claims of creditors, the conveyance is fraudulent: *Case Mfg. Co. v. Perkins*, 106 Mich. 349, 64 N. W. 201; *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840; *Webb v. Ingham*, 29 W. Va. 339, 1 S. E. 816; *Paulk v. Cooke*, 39 Conn. 566. The conveyance will be void though a large indebtedness from the husband to the wife remains unsatisfied: *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840. In *Hansen v. Gregory* (Iowa), 73 N. W. 478, the conveyance was deemed good to the extent of the debt due the wife.

IX. Conveyance by Third Person to Wife.

a. Transfers Through Third Person.—A voluntary conveyance by a husband through a third person to his wife is treated the same as any voluntary conveyance, and is, therefore, generally fraudulent as to existing creditors: *O'Kane v. Vinneedge*, 21 Ky. Law Rep. 1551, 55 S. W. 711; *Reynolds v. Lansford*, 16 Tex. 286; *Mayhew v. Clark*, 33 W. Va. 387, 10 S. E. 785. If the husband is insolvent at the time, the conveyance will be void as to existing creditors, though there is no proof of actual fraud: *Patton v. Bragg*, 113 Mo. 595, 35 Am. St. Rep. 730, 20 S. W. 1059. The same is true if the husband has no other property with which to meet his obligations: *Gardner v. Short*, 19 N. J. Eq. 341.

A conveyance to a wife through a third person for a recited consideration which is merely simulated, a portion only being real, is voluntary and fraudulent as to existing creditors, who are injured thereby: *Roper v. Hackney*, 15 Fla. 323; *Culver v. Graham*, 3 Wyo. 211, 21 Pac. 694; *Clements v. Moore*, 6 Wall. 299. And a suit to set aside such a voluntary conveyance need not allege fraud or the knowledge of fraud on the part of a person taking the voluntary conveyance: *McAninch v. Dennis*, 123 Ind. 21, 22 N. E. 881.

A voluntary conveyance to a wife through a third person is not void as to subsequent creditors, without other indicia of fraud: *Lloyd v. Bunco*, 41 Iowa, 660.

b. Consideration Moving from Third Person.—There is nothing in the policy of the law to prevent a third person from making a gift to another man's wife, so far as concerns the rights of the husband's creditors. Hence a third person, after buying a husband's property at an open, public and bona fide sale, may lawfully give it to the husband's wife. The transaction cannot be fraudulent as to creditors of the husband: *Winch v. James*, 68 Pa. St. 297. So the father of

a wife may make an advancement to her when her husband is insolvent, and the husband's creditors cannot complain of the gift: *May v. Jenkins*, 15 Ill. 101. So a father may deed to his son's wife, and the son's creditors cannot reach the property: *Stow v. Miller*, 16 Iowa, 460. So a father may purchase the property of his daughter's husband at an execution sale and give it to his daughter: *Fulton v. Woodman*, 54 Miss. 158. And see *Stone v. Brown*, 116 Ind. 78, 18 N. E. 392; *Pringly v. Warrall*, 73 Iowa, 561, 35 N. W. 632.

Indeed, any conveyance to a wife is good, notwithstanding the insolvent condition of the husband, and it is no fraud upon the creditors of the husband, where the latter pays no part of the consideration: *Clark v. Krause*, 6 Mackey (D. C.), 108; *Bay v. Sullivan*, 30 Mo. 191. For in order to constitute a transaction fraudulent as against the creditors of the husband, the consideration must come from the husband: *Bay v. Sullivan*, 30 Mo. 191. So where a father of a wife pays the purchase price of land with the understanding that the conveyance is to be to the wife as a gift from him, and the husband takes title in his name, a subsequent conveyance to his wife is valid against the creditors of the husband: *Summers v. Hoover*, 42 Ind. 153. Of similar effect is *Hackworth v. Johns*, 10 Ky. Law Rep. 656, 9 S. W. 656. And if a husband is unable to pay for land he has purchased, and a relative agrees to advance the necessary money if the property is conveyed to the wife, such conveyance, made in accordance therewith, is valid: *Truitt v. Curd*, 13 Ky. Law Rep. 118, 16 S. W. 364. The same is true of a conveyance to the wife in consideration of money advanced by a relative with which to pay the husband's debts: *Dixon v. Lyne*, 10 Ky. Law Rep. 769, 10 S. W. 469.

But where the conveyance to the wife is in pursuance of a prior agreement that the property is to belong to the husband, the transfer will be fraudulent as to creditors: *Johnson v. Christie*, 79 Mo. App. 46. So where the conveyance to a wife is made by the husband in consideration of an agreement with her father made twelve years before, the conveyance will not be sustained: *Hawkins v. Wills*, 49 Fed. 506.

X. Possession as Affecting the Question.

a. **Retention of Possession by Husband.**—Merely suffering the separate estate of a married woman to remain in the possession of her husband is not necessarily fraudulent, as to creditors, if the husband's possession is not inconsistent with the trust. Possession may or may not be evidence of fraud, according to circumstances: *Merritt v. Lyon*, 3 Barb. 110. The possession of a wife under a postnuptial settlement of personal property is usually concurrent with that of her husband, and this being necessarily so, the settlement is not thereby rendered void: *Larkin v. McMullin*, 49 Pa. St. 29. That a

wife continues to live with her husband after a valid gift of personal property to her will not make the gift void: *Farr v. Swigart*, 13 Utah, 150, 44 Pac. 711. Property purchased by a wife may remain in the possession of her husband for the purposes of sale: *Rinn v. Rhodes*, 93 Ind. 389. A conveyance by a husband in trust for his wife is not invalidated by a subsequent possession by the husband, this being consistent with the object of the deed: *Clayton v. Brown*, 17 Ga. 217; *Hudnal v. Teasdall*, 1 McCord, 227, 10 Am. Dec. 671. A husband remaining in possession of land conveyed to his wife is consistent with the deed and with the nature of the relation between husband and wife, and is, therefore, said not to furnish that evidence of fraud which possession retained by a person conveying usually does: *Trustees v. Bryson*, 34 S. C. 401, 13 S. E. 619. It has been held that a retention of possession by the husband is not even a badge of fraud, though the husband was financially embarrassed: *Dresser v. Zabriskie* (N. J.), 39 Atl. 1066. But where the husband is insolvent, and by retaining possession he secures an advantage to himself by securing the use of the property in the support of his family, this may be evidence of fraud which can be rebutted: *Perkins v. Douglass*, 52 S. C. 129, 29 S. E. 400. And an assignment to a third party for the benefit of one's wife, the husband retaining possession the same as before, may be fraudulent as to subsequent creditors whose claims have arisen during the continuance of the possession: *Fielder v. Day*, 2 Sand. 594. But where the deed has been properly recorded, a retention of possession by the husband will not be considered fraudulent: *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412. Where the deed is not recorded, however, and the conveyance is voluntary, and the property continues to be managed by the husband and taxed in his name, the conveyance was deemed fraudulent: *O'Doherty v. Toole* (Ariz.), 15 Pac. 28.

The question of the retention of possession as indicative of fraud more frequently arises when the property is not occupied or possessed jointly at the home of the parties, but is property situated elsewhere. In such a case a change of possession would seem to be necessary, or at least creditors should have some means of ascertaining that the property has been conveyed to the wife. So where a husband gives a bill of sale of a livery-stable to his wife, a retention of full possession and management thereafter is *prima facie* fraudulent: *Higgins v. Spahr*, 145 Ind. 167, 43 N. E. 11.

Under section 3440 of the Civil Code of California, a delivery and continued change of possession is essential to the validity of a conveyance from husband to wife, as against creditors of the husband: *O'Kane v. Whelan*, 124 Cal. 200, 71 Am. St. Rep. 42, 56 Pac. 880. And so a conveyance of personal property to the wife with no change of possession may be fraudulent as to creditors: *Dean v. Walkenhorst*, 64 Cal. 78, 28 Pac. 60; *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857.

Where the wife has exchanged property, given her by her husband, with a third person, the fact that her husband had such property in his possession will not invalidate the wife's title, for under such circumstances the wife's title is derived, not from her husband, but from the person with whom the exchange is made: *Caswell v. Jones*, 65 Vt. 457, 36 Am. St. Rep. 879, 26 Atl. 529.

b. Sufficient Change of Possession.—The cases just cited indicate to some extent what is a sufficient change of possession. A more clear and apparent change of possession seems to be required where a statute requires an immediate delivery, followed by an actual and continued change of possession. And it is said that the fact that the vendor and vendee are husband and wife is no reason why the statute should receive a different or more liberal construction: *Murphy v. Mulgrew*, 102 Cal. 547, 41 Am. St. Rep. 200, 36 Pac. 857. Obviously, however, the mere existence of the relation of husband and wife will in many cases not permit of as complete and open a change of possession as is to be had in the case of strangers. And all that is required is that the change of possession shall be actual and continuous so far as possible, considering the relation of the parties. So where a husband gives personal property to his wife, delivering it at once to her, and thereafter publicly declaring it to be hers, and he does not resume or continue possession as the owner of the property, this is a good change of possession, although he afterward makes use of the property: *Morgan v. Ball*, 81 Cal. 93, 15 Am. St. Rep. 34, 22 Pac. 331. And see *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335, where a sufficient change of possession of a crop of hay sold to the wife is shown.

The law does not require a family to be broken up to enable a wife to acquire and maintain possession of property. "Her possession," said the court in *Stanley v. National Union Bank*, 115 N. Y. 122, 22 N. E. 29, "must be such as the circumstances of the case permit and such as she is capable of taking and enjoying; and when she has done all that is possible for her to do in this respect, it is a question of fact to be determined by the jury whether she was, in fact, in possession of the property or not." So it was held that where a husband's mortgaged property is advertised for sale and sold at public auction, and the wife notoriously became its purchaser on such sale, she acquired a valid possession, though her husband continued to live with her. Indeed, when a husband and wife are living together, it is sometimes impossible to make a visible change of possession: *Hughes v. Bell*, 62 Ill. App. 74. A husband may make a valid gift of household goods to his wife: *Norbeck v. Davis*, 157 Pa. St. 399, 27 Atl. 712. Where a husband conveys property to his wife and leaves the state, there is a sufficient change of possession: *Perkins v. Douglass*, 52 S. C. 129, 29 S. E. 400. The mere joint possession of husband and wife has been held not to render a conveyance for the benefit of a wife fraudulent: *United States Bank v. Lee*, 13

Pet. 107. But a gift of personal property to a wife, which is not recorded, and there is no visible change of possession, the property continuing to be used by all the members of the family as before, is invalid as against existing creditors: *McAfee v. Busby*, 69 Iowa, 328, 28 N. W. 623; *Wheeler v. Selden*, 63 Vt. 429, 25 Am. St. Rep. 771, 21 Atl. 615. Where there is no delivery of stock sold to a wife, other than the making and delivery of a bill of sale, there is no sufficient change of possession: *McKee v. Garcelon*, 60 Me. 165, 11 Am. St. Rep. 200. A sufficient change of possession exists where a wife, whose husband is a jeweler, purchases jewelry and takes it home to keep, although she subsequently intrusts him with a part of it to sell: *Roberts v. Burr* (Cal.), 54 Pac. 849.

XI. Right to Prefer Wife as Creditor.

In the absence of a statute limiting or prohibiting such right, a debtor may prefer one creditor to another, and it is immaterial that the preferred creditor is his own wife. Hence, the rule is firmly established that a husband may convey property to his wife to pay a debt to her, in preference to his other creditors: *Magniac v. Thomson*, 7 Pet. 348; *National Bank v. Dickinson*, 107 Ala. 265, 18 South. 144; *Stranuann v. Scheeren*, 7 Colo. App. 1, 42 Pac. 191; *Hughes v. Bell*, 62 Ill. App. 74; *Bragg v. Stanford*, 82 Ind. 234; *Dice v. Irwin*, 110 Ind. 561, 11 N. E. 488; *Winfield Nat. Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *Ferguson v. Spear*, 65 Me. 277; *Hill v. Bowman*, 35 Mich. 191; *Allen v. Antisdale*, 38 Mich. 229; *Jordan v. White*, 38 Mich. 253; *Savage v. Dowd*, 54 Miss. 728; *Lanbrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063; *Ward v. Parlin*, 30 Neb. 376, 46 N. W. 529; *Benson v. Maxwell*, 105 Pa. St. 274; *Gerald v. Gerald*, 28 S. C. 412, 6 S. E. 290; *Cale v. Shaw*, 33 W. Va. 299, 10 S. E. 637; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075; *Hairston v. Hairston*, 35 S. C. 298, 14 S. E. 634; *Barton v. Brent*, 87 Va. 385, 13 S. E. 29; *Hinchman v. Parlin etc. Co.*, 74 Fed. 698; *Woodworth v. Sweet*, 44 Barb. 268.

The only restriction upon such a preference is that it must be made in good faith in payment of a bona fide debt: *Winfield Nat. Bank v. Croco*, 46 Kan. 629, 26 Pac. 942; *Ward v. Parlin*, 30 Neb. 376, 46 N. W. 529; *Gerald v. Gerald*, 28 S. C. 442, 6 S. E. 290; *German Ins. Co. v. Bartlett*, 188 Ill. 165, 80 Am. St. Rep. 172, 58 N. E. 1075; *Cooke v. Peter*, 93 Ill. App. 1. He may prefer his wife, though he is thereby deprived of the means to pay other debts: *Ferguson v. Spear*, 65 Me. 277; *Jordan v. White*, 38 Mich. 253; *Cooper v. First Nat. Bank*, 40 Kan. 5, 18 Pac. 937.

For even an insolvent husband may prefer his wife, the same as another creditor: *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773; *Whaun etc. Co. v. Atkinson*, 84 Ala. 592, 4 South. 681; *De Ford v. Nye*, 40 Kan. 665, 20 Pac. 481; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606. While a preference in good faith raises no presumption of fraud, yet it will be scrutinized closely if made when the husband is

in embarrassed circumstances: *Hinchman v. Parlin etc. Co.*, 74 Fed. 698; *Hairston v. Hairston*, 35 S. C. 298, 14 S. E. 634. But if the transaction would have been valid as between strangers, it is valid between husband and wife: *Tomlinson v. Matthews*, 98 Ill. 178. And it is immaterial what the husband's motive may have been: *Kilgore v. Stoner* (Ala.), 12 South. 60. He may have intended to keep it from other creditors: *Fleming v. Weagley*, 32 Ill. App. 183.

A husband may prefer his wife to the exclusion of other creditors: *Cartwright v. Cartwright*, 68 Ill. App. 74; *Laird v. Davidson*, 124 Ind. 412, 25 N. E. 7. However much it may hinder or delay other creditors in the collection of their claims: *Muir v. Miller*, 103 Iowa, 127, 72 N. W. 409; a wife may take a mortgage to secure her debt, though she knows her husband is financially embarrassed: *Miller v. Krueger*, 36 Kan. 344, 13 Pac. 641; *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040. Indeed, it is no objection to a conveyance made to a wife to prefer her as a creditor that she knew of her husband's insolvent condition: *Meredith v. Schaap* (Iowa), 85 N. W. 628; *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488.

A wife does not necessarily lose her right to be preferred as a creditor by reason of her failure to make her claim known to others, even as against one who trusted the husband in ignorance of such claim: *Dull v. Merrill*, 69 Mich. 49, 36 N. W. 677; *Crane v. Barkdoll*, 59 Md. 534. And this, although a long period may have intervened between the origin of the debt and the execution of a deed to secure it: *Crane v. Barkdoll*, 59 Md. 534. And see *Brock v. Hudson County Nat. Bank*, 48 N. J. Eq. 615, 27 Am. St. Rep. 451, 23 Atl. 269. Even the running of the statute of limitations will not affect the right to prefer a wife: *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488; *French v. Motley*, 63 Mo. 326.

XII. Laches of Wife in Enforcing Debt.

a. **Laches Generally.**—The fact that the claim of the wife is an old one does not of itself invalidate a conveyance to her in payment thereof: *Brookville Nat. Bank v. Kimble*, 76 Ind. 195. But, as already pointed out, the length of time that the debt has run is an important circumstance to take into consideration in ascertaining the good faith of the transaction. The mere fact that a wife had advanced money to her husband a long time previous will not sustain a conveyance as against creditors: *Leathwhite v. Bennet* (N. J.), 11 Atl. 29. So where a husband uses his wife's money in his business for years, with no agreement that it shall still remain her property, a conveyance to the wife based upon such an alleged consideration when the husband has become insolvent, is a fraud upon creditors: *Humes v. Scruggs*, 94 U. S. 22. And where a wife allows her husband to use her money as his own, and invest it in his own name, and thereby obtain credit on the faith of his being the owner of the property, she cannot, years afterward, interpose a claim to the property so acquired, to the injury of the husband's creditors: *Miller v. Payne*, 4 Ill. App. 112; *Kanawha Valley Bank v. Atkinson*, 32 W. Va.

203, 25 Am. St. Rep. 806, 9 S. E. 175. Husband and wife cannot use the pretense of an indebtedness incurred years before to sustain a conveyance: *Jackson v. Beach* (N. J.), 9 Atl. 380. Even a promise to convey property to the wife will not sustain a conveyance made twenty years later, after the husband has become heavily in debt: *Borden v. Doughty*, 42 N. J. Eq. 314, 3 Atl. 352. And the fact that a wife furnished a portion of the consideration money in the purchase of property twenty years before will not of itself sustain a conveyance of such land as against the rights of intervening creditors: *Brownell v. Stoddard*, 42 Neb. 177, 60 N. W. 380. Where there is no evidence of an indebtedness until twenty years after it is alleged to have arisen, and no demand was ever made for its payment, a mortgage given for the stated purpose of securing such indebtedness is void as to existing creditors: *McCreary v. Skinner*, 83 Iowa, 362, 49 N. W. 986; *Lee v. Cole*, 44 N. J. Eq. 318, 15 Atl. 531.

b. Statute of Limitations.—If a debt to a wife is bona fide, it may be paid even after the statute of limitations has run against it. The fact that it is outlawed is immaterial, even though the husband was in failing circumstances or insolvent at the time: *City Bank v. Wright*, 68 Iowa, 132, 26 N. W. 35; *Plummer & Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600; *Manchester v. Tibbetts*, 121 N. Y. 219, 18 Am. St. Rep. 816, 24 N. E. 304; *Vansickle v. Wells, Fargo & Co.*, 105 Fed. 16; *Kennedy v. Powell*, 34 Kan. 22, 7 Pac. 606.

The statute of limitations is a mere personal privilege, and one which the husband alone could avail himself of: *Plummer etc. Co. v. Rohman*, 61 Neb. 61, 84 N. W. 600. Furthermore, the statute of limitations does not run against the wife, as a rule: *Second Nat. Bank v. Merrill*, 81 Wis. 151, 29 Am. St. Rep. 877, 50 N. W. 505. Neither the statute of limitations nor the presumption of payment arising from lapse of time can be held to apply to a loan from a wife to her husband: *Dice v. Irvin*, 110 Ind. 561, 11 N. E. 488. A mortgage may be given to secure a valid debt due a wife, though the debt is barred by the statute of limitations: *Comer & Co. v. Allen*, 72 Ga. 1; for the statute does not run in favor of stranger against a claim due from husband to wife: *Dayton Spice Mills Co. v. Sloan*, 49 Neb. 622, 68 N. W. 1040; *Manchester v. Tibbetts*, 121 N. Y. 219, 18 Am. St. Rep. 816, 24 N. E. 304. A husband may revive a debt due his wife, even as against judgment creditors: *Robinson v. Bass* (Va.), 40 S. E. 660. And the wife may be paid compound interest on such a debt according to the original agreement between the parties: *Frost v. Steele*, 46 Minn. 1, 48 N. W. 413.

The fact that a debt to the wife is barred by the statute of limitations is never conclusive evidence of fraud: *French v. Motley*, 63 Mo. 326. Though this fact is a circumstance to be considered in investigating the fairness of the transaction: *Comer v. Allen*, 72 Ga. 1; *Kanawha Valley Bank v. Atkinson*, 32 W. Va. 203, 25 Am. St. Rep. 806, 9 S. E. 175.

XIII. Burden of Proof.

a. As to Fraud.

1. **Existing Creditors.**—There is considerable real, and more apparent conflict in the authorities as to upon whom the burden of proof lies, to establish the fraudulent character of a conveyance from husband to wife. The general rule doubtless is that a party who alleges fraud should prove it: *Evans v. Rugee*, 57 Wis. 623, 16 N. W. 49; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Hershy v. Latham*, 46 Ark. 542; *Darling v. Hurst*, 39 Mich. 765; *Mayers v. Kaiser*, 85 Wis. 382, 39 Am. St. Rep. 849, 55 N. W. 688; *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845. And this general rule has influenced many of the courts to say that the burden is on a creditor to establish fraud, and requiring him to show that a conveyance from a husband to a wife has been made in fraud of his rights: *Gilbert etc. Co. v. Glenney*, 75 Iowa, 513, 39 N. W. 818; *Wolf v. Chandler*, 58 Iowa, 569, 12 N. W. 600; *Guy v. Craighead*, 40 App. Div. 260, 57 N. Y. Supp. 1070; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Darling v. Hurst*, 39 Mich. 765; *Ettlinger v. Kahn*, 134 Mo. 492, 36 S. W. 37; *Third Nat. Bank v. Cramer*, 78 Mo. App. 476; *Rhodes v. Wood*, 93 Tenn. 702, 28 S. W. 294; *Cox v. Scott*, 9 Baxt. 305; *Reid v. Gray*, 37 Pa. St. 508, 78 Am. Dec. 444; *Farrell v. O'Neil*, 22 La. Ann. 619.

On the other hand, the very existence of the relation, and the fact that the opportunity afforded by the existence of such relation to defraud creditors is so great, have induced other courts to insist that the honesty and good faith of a conveyance from husband to wife should be shown by the parties claiming under the conveyance: *Semmens v. Walters*, 55 Wis. 675, 13 N. W. 889; *Evans v. Rugee*, 57 Wis. 623, 16 N. W. 49; *Hershy v. Latham*, 46 Ark. 542; *Robinson v. Moseley*, 93 Ala. 70, 9 South. 372; *Jansen v. Lewis*, 52 Neb. 556, 72 N. W. 861; *Stevens v. Carson*, 30 Neb. 544, 46 N. W. 655; *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845; *Herzog v. Weiler*, 24 W. Va. 199; *Seitz v. Mitchell*, 94 U. S. 583.

And yet the question of fraud is to be determined from so many different circumstances, the fact that one court may state that the burden is on the wife or those claiming under her may mean no more than that in view of the other circumstances which appear, the burden in this case should be borne by the wife. While if the facts were different, the same court would lay the burden of proving fraud upon the creditors. Indeed, the burden may frequently shift in accordance with the facts that are established. It is, therefore, important to understand the precise facts under which the court has decided that the burden is upon either the wife or the creditor to establish fraud. And, in deciding this question, the existence of statutes is of paramount importance. Thus in Maine, since the act of 1847, authorizing a married woman to hold property exempt from the payment of her husband's debts, the burden is on the creditor to show that the property she holds came from her husband, and that it was conveyed in fraud of creditors: *Winslow v. Gilbreth*, 50 Me. 90. And so

where a wife is separated in property from her husband, the burden of proving the invalidity of a purchase by her is on the creditors: *Chaffe & Sons v. De Moss*, 37 La. Ann. 186. If a husband is not in debt at the time he makes a settlement upon his wife, and the settlement is reasonable, it is not void unless made with a fraudulent intent, which must be proved by the creditor alleging it: *Larkin v. McMullin*, 49 Pa. St. 29.

Where a husband answers, under oath, that a conveyance to his wife was made prior to the time when the debt to his creditor was contracted, and with no intent to defraud, the burden of proving fraud is on the creditor: *Knight v. Kidder* (Me.), 1 Atl. 142. Where a wife shows that she acquired the property by paying a valuable consideration therefor the burden of showing fraud in the transaction then devolves upon the creditor who is attacking the conveyance: *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Semmens v. Walters*, 55 Wis. 675, 13 N. W. 889; *Evans v. Rugee*, 57 Wis. 623, 16 N. W. 49; *Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773. And in Mississippi it is held that the mere recital of a valuable consideration is sufficient to cast upon the creditor the burden of showing that the conveyance was fraudulent: *Virden v. Dwyer*, 78 Miss. 763, 30 South. 45.

In some states the burden of establishing fraud appears to be on the creditors as fully as if the conveyance was made to a stranger instead of to the grantor's wife: *Guy v. Craighead*, 40 App. Div. 260, 57 N. Y. Supp. 1070; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105; *Meredith v. Schaap* (Iowa), 85 N. W. 628; *Peaslee v. Collier*, 83 Mich. 549, 47 N. W. 353; *Rhodes v. Wood*, 93 Tenn. 702, 28 S. W. 294; *Washington v. Ryan*, 5 Baxt. 622.

In other cases, however, where the burden is said to rest upon the creditor, it clearly appeared from the evidence that the conveyance was made in payment of a valid debt due the wife: *Third Nat. Bank v. Cramer*, 78 Mo. App. 476; *Ettlinger v. Kahn*, 134 Mo. 492, 36 S. W. 37. And where this appears—in other words, where there is a valuable and adequate consideration for the conveyance—the burden is always shifted to the creditor to establish the fraudulent character of the conveyance.

At least in those states where the burden is said to rest upon a wife to establish the good faith of a conveyance to her when attacked by existing creditors, the presumption is that the conveyance is fraudulent: *Jansen v. Lewis*, 52 Neb. 556, 72 N. W. 861; *Maxwell v. Hanshaw*, 24 W. Va. 405. Lack of an adequate consideration will raise a presumption of fraud which will cast upon those claiming under the conveyance the burden of rebutting it: *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482.

Some of the cases, while recognizing the general rule that fraud will not be presumed, but must be proved by the party alleging it, nevertheless clearly refuse to hold the rule applicable to transactions between husband and wife, for the reason that there is such a community of interest between husband and wife, such transfers are

resorted to for the purpose of withdrawing the husband's property from the reach of creditors. Hence it is held that the burden is upon the wife to establish the good faith of the transfer to her: *Carson v. Stevens*, 40 Neb. 112, 42 Am. St. Rep. 661, 58 N. W. 845; *Herzog v. Weiler*, 24 W. Va. 199; *Scott v. Machamer*, 54 Neb. 514, 74 N. W. 854; *Adler etc. Clothing Co. v. Hellman*, 55 Neb. 266, 75 N. W. 877; *Kirchman v. Kratky*, 51 Neb. 191, 70 N. W. 916; *Manning v. Carruthers*, 83 Md. 1, 34 Atl. 254; *Glass v. Zutavern*, 43 Neb. 334, 47 Am. St. Rep. 763, 61 N. W. 579; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279; *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599; *Fisher v. Shelver*, 53 Wis. 498, 10 N. W. 681.

The very fact that the conveyance is between husband and wife raises a presumption against the wife in a contest with her husband's creditors, which she must overcome by affirmative proof: *Kirchman v. Kratky*, 51 Neb. 191, 70 N. W. 916; *Manning v. Carruthers*, 83 Md. 1, 34 Atl. 254; *Seitz v. Mitchell*, 94 U. S. 583; *Runkle v. Runkle*, 98 Va. 663, 37 S. E. 279. A voluntary conveyance is presumptively void as to existing creditors, and the burden of proof is upon the party making the conveyance to support it: *Wynne v. Mason*, 72 Miss. 424, 18 South. 422. A mere denial in the answer that the conveyance was voluntary will not shift the burden of proof, but a valuable consideration moving from the wife must be proved: *Robbins v. Armstrong etc. Co.*, 84 Va. 810, 6 S. E. 130.

When the decisions speak about the burden of proving good faith as being on the wife, they mean generally that she must show that she purchased the property out of her own separate estate. In other words, it is a question of consideration: *Semmens v. Walters*, 55 Wis. 675, 13 N. W. 889. The whole burden is imposed on the wife negatively to disprove fraud, or affirmatively to prove her good faith in the transaction. And "when she has proved that she has made the purchase for a valuable consideration, paid out of her separate estate, or by some other person for her, she has then proved all the bona fides or good faith in the purchase required by the statute": *Evans v. Rugee*, 57 Wis. 623, 16 N. W. 49.

The rule that the burden of showing good faith is on the wife does not apply to the purchase of exempt property: *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3. And where a conveyance is made to a wife from a third person, one who claims that the deed was in fraud of her husband's creditors has the burden of proof: *Arndt v. Harshaw*, 53 Wis. 269, 10 N. W. 390.

Where property which is subject to an equitable lien is conveyed to the wife, who claims it as a purchaser, the burden is on her to show good faith in the transaction and want of notice of the creditor's rights: *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765. Indeed, where all the facts and circumstances tend to show knowledge of or notice to the grantee wife of the fraudulent intent of her husband, the burden is upon her to disprove such notice: *Dent v. Pickens*, 46 W. Va. 378, 33 S. E. 303.

2. **Subsequent Creditors.**—The authorities appear to be unanimous in drawing a distinction between pre-existing and subsequent creditors, and hold that when a conveyance to a wife is attacked by subsequent creditors, the burden rests upon them to establish its fraudulent character: *Jansen v. Lewis*, 52 Neb. 556, 72 N. W. 861; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946; *Belford v. Crane*, 16 N. J. Eq. 265, 84 Am. Dec. 155; *Larkin v. McMullin*, 49 Pa. St. 29; *Wynne v. Mason*, 72 Miss. 424, 18 South. 422.

b. **As to Consideration.**—The authorities are far more harmonious upon the question as to burden of proof in establishing the consideration or lack of consideration paid by the wife for the conveyance to her. It is, therefore, very generally held that when a conveyance is assailed by creditors of the husband on the ground of fraud, the burden of proof is on the wife to establish the existence, the amount, and the validity of the consideration: *Gordon etc. Co. v. Tweedy*, 71 Ala. 202; *Seitz v. Mitchell*, 94 U. S. 580; *Hodges v. Hickey*, 67 Miss. 715, 7 South. 404; *Beecher v. Wilson etc. Co.*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209; *De Farges v. Ryland*, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805; *Elyton Land Co. v. Vance*, 119 Ala. 315, 24 South. 719; *American etc. Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 South. 751; *Ruppert v. Hurley (N. J.)*, 47 Atl. 280; *Claffin v. Ambrose*, 37 Fla. 78, 19 South. 628; *Levi v. Rothschild*, 69 Md. 348, 14 Atl. 535; *Simms v. Morse*, 2 Fed. 325; *Mangum v. Finnecane*, 38 Miss. 354; *Peeler v. Peeler*, 109 N. C. 628, 14 S. E. 59; *Rixey v. Deitrick*, 85 Va. 42, 6 S. E. 615.

A postnuptial settlement is *prima facie* fraudulent and void as against pre-existing creditors, and the burden is upon those claiming under it to show a valuable consideration: *Beecher v. Wilson etc. Co.*, 84 Va. 813, 10 Am. St. Rep. 883, 6 S. E. 209; *Perry v. Ruby*, 81 Va. 317; *Fink etc. Co. v. Denny*, 75 Va. 663.

It must first appear that the creditor attacking the conveyance was such at the time the conveyance was made: *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 South. 149; *Elyton Land Co. v. Vance*, 119 Ala. 315, 24 South. 719; for a wife is not required to show that she paid a valuable and adequate consideration for the property conveyed to her, as to subsequent creditors, when the husband was not in debt at the time: *Wheeler etc. Mfg. Co. v. Monahan*, 63 Wis. 198, 23 N. W. 127.

A wife must show that the property was purchased with her own separate funds, or at least with property other than the husband's; otherwise the presumption is that it was bought through means furnished by the husband: *Kahn v. Weinlander*, 39 Fla. 210, 22 South. 653; *American etc. Mortgage Co. v. Maxwell*, 39 Fla. 489, 22 South. 751; *Jack v. Kintz*, 177 Pa. St. 571, 35 Atl. 867; *Southern Home etc. Assn. v. Riddle*, 129 Ala. 562, 29 South. 667; *Turner v. Gottwals*, 15 App. Cas. (D. C.) 43; *Brickley v. Walker*, 63 Wis. 563, 32 N. W. 773; *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599; *Minneapolis etc. Co. v. Halonen*, 56 Minn. 469, 57 N. W. 1135; *Reeves v. Webster*, 71 Ill. 307; *Seeds v. Kahler*, 76 Pa. St. 262; *Grant v. Sutton*, 90 Va. 771, 10

S. E. 784; *Hutchinson v. Boltz*, 35 W. Va. 754, 14 S. E. 267. The property must not be paid for with the funds of her husband, either directly or indirectly, and this the wife must show: *Watts v. Burgess & Co.*, 131 Ala. 333, 30 South. 868.

The married women's acts do not change the rule which places the burden of proof upon the wife to show that she furnished the consideration money out of her own separate estate, or that it came from a source other than her husband: *Sikking v. Fromm*, 23 Ky. Law Rep. 2138, 66 S. W. 760. Where the wife claims that the consideration was a debt due to her from her husband, the burden is upon her to establish that she was a bona fide creditor: *Stockslager v. Mechanics' etc. Institute*, 87 Md. 232, 39 Atl. 742; *Darden v. Ferguson* (Va.), 27 S. E. 435. The burden is on the wife to show that money given to her husband was a loan and not a gift: *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871. We have already pointed out, however, that when a husband takes and uses the corpus of his wife's separate estate, the presumption of law is against a gift and in favor of a loan. So that while the burden is upon the wife in the first instance to establish that her husband took and used the principal of her separate estate, yet when that fact is established, the burden then shifts to the creditor, who must show that such taking and use was by gift from the wife. This rule is applicable only to the principal of the wife's separate estate. This is the doctrine of the principal case, and of the better considered authorities generally: See *Bergey's Appeal*, 60 Pa. St. 408, 100 Am. Dec. 578; *Stickney v. Stickney*, 131 U. S. 227, 9 Sup. Ct. Rep. 677; *Grabill v. Moyer*, 45 Pa. St. 530; *Sykes v. City Sav. Bank*, 115 Mich. 321, 69 Am. St. Rep. 562, 73 N. W. 369.

Where a husband procures a lease in the name of, and as the agent for, his wife, the burden is on her to show that she furnished the consideration: *Yates v. Law*, 86 Va. 117, 9 S. E. 508. So where a husband confesses a judgment for the benefit of his wife, the burden is on her to establish that the judgment was given to her in good faith to secure a debt of the wife from the husband from her separate estate: *Wilson v. Silkman*, 97 Pa. St. 509; *Lively v. Winton*, 30 W. Va. 554, 4 S. E. 451.

When the consideration for a conveyance is recited in the deed, the authorities are divided as to whether this will shift the burden of proof to the creditors. Such a recital is good as between the parties. But as against creditors of the husband who have proved that they were creditors at the time of the conveyance, we think the better rule is, that the consideration recited in the deed is not evidence of its existence, but must be proved by the wife by competent evidence: *Ezzell v. Brown*, 121 Ala. 150, 25 South. 832; *Gordon etc. Co. v. Tweedy*, 71 Ala. 202; *De Farges v. Ryland*, 87 Va. 404, 24 Am. St. Rep. 659, 12 S. E. 805. As is aptly said in this last case: "If such recitals were proof against creditors, it would be putting into the hands of a fraudulent debtor a most dangerous weapon." On the other hand, under some of the liberal married

women's acts, it is held that a recital of a consideration makes the conveyance prima facie valid, and the burden of proving the want of consideration and that the conveyance is fraudulent is cast upon the creditors to assail it: *Winslow v. Gilbreth*, 50 Me. 90; *Virden v. Dwyer*, 78 Miss. 763, 30 South. 45; *Stockett v. Holliday*, 9 Md. 480; *Rhodes v. Wood*, 93 Tenn. 702, 28 S. W. 294.

In Georgia, a distinction is drawn between a conveyance from husband to wife, and one from a third person to a wife. In the first case, if the conveyance is attacked by creditors, the burden is on the wife to make a fair showing about the whole transaction. In the latter case of a purchase by a wife from a third person, where the wife has a separate estate, creditors of the husband who attack the conveyance must show fraud or collusion, or that the wife did not have any separate estate or means wherewith to purchase the property: *Richardson v. Subers*, 82 Ga. 427, 14 Am. St. Rep. 189, 9 S. E. 172.

Tennessee appears to be the only state to hold that when creditors attack a conveyance to the wife as fraudulent and without consideration, which the wife denies in her answer, the burden is on the creditors to establish the truth of their allegations: See *Cox v. Scott*, 9 Baxt. 305; *Washington v. Ryan*, 5 Baxt. 622; *Rhodes v. Wood*, 93 Tenn. 702, 28 S. W. 294; *Walters v. Brown* (Tenn.), 46 S. W. 777. From the opinion in *Meredith v. Schaap* (Iowa), 85 N. W. 628, it would appear that the Iowa courts hold with those of Tennessee that the burden of proof is on the attacking creditors to show the want of consideration. But certainly if the deed on its face shows a want of or an inadequate consideration, the burden is on the wife to show that the conveyance was for a valuable consideration: *Baldwin v. Tuttle*, 23 Iowa, 66.

The rule that the burden is on the wife to show that a conveyance to her was for a valuable consideration does not apply to the purchase of exempt property: *Allen v. Perry*, 56 Wis. 178, 14 N. W. 3. And so when the wife claims under a trust deed for her benefit from a third party, she is not required to show the validity of any consideration moving from her: *Evans v. Kilgore*, 147 Pa. St. 19, 23 Atl. 201.

c. As to Insolvency.—Even a voluntary conveyance to a wife from her husband is valid as against creditors if the husband is not thereby rendered insolvent, but retains sufficient property to pay all of his debts: *Bittinger v. Kasten*, 111 Ill. 260; *Eames v. Dorsett*, 147 Ill. 540, 35 N. E. 735. A gift to a wife is proper if the husband's means will permit of it: *Stephenson v. Cook*, 64 Iowa, 265, 20 N. W. 182. And the question arises, Upon whom rests the burden of showing that the husband's gift to his wife left him either solvent or insolvent, and incapable of paying his debts? There are well-considered cases on both sides of the question, some of them holding that since a gift to a wife is not of itself improper, before a creditor can ask to have it set aside, he must show that the husband did

not retain sufficient other property with which to pay his debts: See *Stephenson v. Cook*, 64 Iowa, 265, 20 N. W. 182; *Moritz v. Hoffman*, 35 Ill. 553; *Bittinger v. Kasten*, 111 Ill. 260; *Guy v. Craighead*, 40 App. Div. 260, 57 N. Y. Supp. 1070; *Kain v. Larkin*, 131 N. Y. 300, 30 N. E. 105. In the absence of any evidence to show what property the husband had at the time of the conveyance to his wife, the conveyance will not be considered invalid: *Eagan v. Downing*, 55 Ind. 65.

On the other hand, there are equally well-considered cases holding that since voluntary conveyances are presumptively fraudulent as to existing creditors, the burden is on the wife to show the solvency of the husband at the time of the gift to her, and that he had ample means readily and conveniently accessible to his creditors: *Dixon v. Sanderson*, 72 Tex. 359, 13 Am. St. Rep. 801, 10 S. W. 535; *Walsh v. Ketchum*, 84 Mo. 427; *Woolston's Appeal*, 51 Pa. St. 452; *Welcker v. Price*, 2 Lea, 666.

CASES
IN THE
SUPREME COURT
OF
OHIO.

CITY OF CANTON v. SHOCK.

[66 Ohio St. 19, 63 N. E. 600.]

RIPARIAN PROPRIETOR.—A Municipal Corporation situated on a stream is a riparian proprietor with the rights and liabilities incident to such proprietorship. (pp. 558, 559.)

WATERS OF STREAM—Use by City.—As an upper riparian proprietor, a city has the right to use from a stream all the water it needs for its own purposes though it receives pay therefor; but it has no right materially to diminish the flow, to the injury of a lower proprietor, by transporting water away from the city, or by supplying it to outsiders, or unreasonably to its own inhabitants for power purposes. (pp. 559, 563.)

WATERS OF STREAM—Use for Power.—When there is not sufficient water in a stream fully to supply all proprietors for power, each should use it reasonably with as little injury to the others as circumstances permit. (p. 560.)

WATERS.—The Primary Use of Water is for Domestic purposes and its secondary use for the purposes of power. (p. 561.)

WATERS.—A Riparian Owner has the Right to the Use of a stream for any legal purpose, provided he returns it uncorrupted and without essential diminution. (p. 562.)

WATERS—Compensation for.—The Water Taken by a City from a stream for its use is by virtue of its rights as a riparian owner, and not by right of eminent domain. Hence, no compensation need be made therefor. (p. 562.)

WATERS.—A Lower Riparian Proprietor is Entitled to the natural flow of a stream, subject to the lawful use of the water by upper proprietors. (p. 563.)

The city of Canton established its system of waterworks on an adjacent stream. The defendants in error own a gristmill located on the stream a short distance below. As the city grew and used larger quantities of water, the supply for running the

mill became inadequate during dry seasons. Thereupon the defendants in error commenced an action against the city for damages. They recovered a judgment in the court of common pleas, which was affirmed in the circuit court. Whereupon the city filed its petition in error to the supreme court.

Ed. L. Smith, city solicitor, and Lynch, Day & Day, for the plaintiff in error.

Webber & Turner and A. A. Thayer, for the defendants in error.

27 BURKET, J. As this is an action against the city for damages, no question as to eminent domain or appropriation of private property for public uses is involved in the issue, the controlling issue being as to whether the city, as a municipal corporation, is a riparian proprietor having the right to use the waters of the creek for its own purposes, and to supply them to its inhabitants for the ordinary purposes of life, and as to whether the right to use water from a stream by one riparian proprietor for manufacturing purposes, such as running a gristmill, is inferior or equal to the right to use the water from the same stream by an upper proprietor for domestic purposes.

It is urged by counsel for defendants in error that a municipality situated on a natural watercourse is not in its corporate capacity a riparian proprietor, and that only those inhabitants whose lots or lands border on the stream are such proprietors, and some cases are cited which seem to take that view of the law.

Other cases are decided upon the theory that such municipality is itself, in its corporate capacity, a riparian proprietor and entitled as such to riparian rights in the stream upon which it is situated: *Barre Water Co. v. Carnes*, 65 Vt. 626, 36 Am. St. Rep. 891, 27 Atl. 609; *Mayor v. Commissioners*, 7 Pa. St. 348; *Philadelphia v. Collins*, 68 Pa. St. 106; *Jones on Easements*, sec. 747, and cases cited in a note to the section.

In this state the question remains undecided by this court, and therefore is an open one, and we are at liberty to follow such rule of decision as is supported by sound reason and the weight of authority.

28 It was held by this court at this term in *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, that a city situate on a stream is liable in its corporate capacity to a lower

proprietor for polluting the water of such stream by running the sewage of such city and its inhabitants into such stream. This case holds the city in its corporate capacity, and as an upper proprietor, liable to a lower proprietor for polluting the water of the stream; and if the city is liable, not only for its own acts, but also for the acts of its inhabitants, in flowing sewage into the stream, it must be upon the principle that as upper riparian proprietor, it has violated its duty toward a lower riparian proprietor on the same stream, and that therefore, the city in its corporate capacity is a riparian proprietor on the stream, and must bear the burdens of such position.

While the inhabitants own their lots individually, the city owns the streets, the fire department and all other public property and public works, and in its corporate capacity provides for the convenience and welfare of its inhabitants, as to streets, fire protection, lighting and supplying water, and in such and other like matters the city overshadows the individuals, and stands in its corporate capacity as a single proprietor extending throughout its entire limits, and entitled as such to all the rights and subject to all the liabilities of a riparian proprietor on the stream upon which it is situated.

Sound reason, the weight of authority, and the present advanced state of municipal government, rights and liabilities require that a municipality should be held and regarded, in its entirety, as an individual entity, having in its corporate capacity the ²⁹ rights and subject to the liabilities of a riparian proprietor, and we so hold in this case.

The bringing of the action against the city for damages is of itself an implied admission that the city in its corporate capacity is an upper proprietor, liable for the wrongful diversion or use of the water of the stream upon which it is situated. Being charged with the liability of such upper proprietor, as conceded by bringing the action and as was rightly held in the Mansfield case, it must also be accorded the rights and benefits of such proprietor.

As such proprietor the city uses the water of the stream, through its waterworks, in extinguishing fires, sprinkling streets, and other public purposes, and supplies water to its inhabitants for domestic use and manufacturing purposes.

Being an upper riparian proprietor, it follows as a matter of law that it has the right to use out of the stream all the water it needs for its own purposes, returning to the stream

all that is not consumed in such use; not, however, transporting the water, as was done in *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34, 3 Atl. 780, nor diverting the water as was done in *Wheatley v. Chrisman*, 24 Pa. St. 298, 64 Am. Dec. 657.

The right of an upper proprietor to use the water of a stream for manufacturing purposes is at least equal to the right of a lower proprietor on the same stream to use the water for a like purpose, and so long as the upper proprietor uses the waters reasonably and returns all the water not consumed in the use, back into the stream, the legal rights of the lower proprietor are not invaded.

There being no right of property in the water of a natural flowing stream, the only right being to the use of the water as it flows by the lands adjoining the ³⁰ stream, it follows that as the water comes first to the upper proprietor, he may use it reasonably for power purposes, returning to the stream all that is not consumed in the use, and that the right of the lower proprietor attaches only to the use of the water that comes to his premises after passing and so serving the purposes of the upper proprietor.

As the right of the city to supply water to manufactories within its bounds for power purposes is only equal to the right of a lower proprietor to use water for the same purpose, the question arises in this case as to the rights of the parties to use the water of the stream for such purposes. The question is a difficult one both in theory and application, as the different sizes of streams and different circumstances have caused courts to make different holdings, but the combined result of the cases seems to be that where there is not sufficient water in a stream to supply fully the needs of all the proprietors on the stream for power purposes, no one has the right to use all the water and thereby deprive those below him from the use of any; nor can those below rightly insist that those above shall use no water for power and thereby save it all for those below. Each should use the water reasonably, and so as to do as little injury to the others as circumstances will permit. As a loss must fall upon one or the other of such proprietors, neither should be compelled to bear the whole loss, but the water should be so divided and used that each one may bear his reasonable proportion of the loss, and that in case of difference between upper and lower proprietors in such cases the question should be left to the sound judgment of a jury,

under proper instructions, to say whether the party complained against has used for power purposes, under all the circumstances, more ³¹ than his just proportion of the water of the stream: *Evans v. Merriweather*, 3 Scam. 492, 38 Am. Dec. 106.

This being so, the city of Canton, in supplying water to its inhabitants for power purposes, had the right to use the water of a stream to a reasonable extent only, and so as to do as little injury as might be, under all the circumstances, to the lower proprietor, each party bearing an equitable share of the loss caused by the shortage of water. Dry seasons are not caused by either party, but are the act of God, and each party must bear the losses resulting to him therefrom.

From the earliest dawn of history to the present time, the primary use of water has been for domestic purposes, and its secondary use for the purposes of power. People on the upper stream have the right to quench their thirst, and the thirst of their flocks and herds, even though by so doing the wheels of every mill on the lower stream should stand still: *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34, 41, 3 Atl. 780. And the same right in the use of water as to quenching thirst extends to all uses for domestic purposes; and the rights of a lower proprietor to the use of the waters of a stream for power purposes is subject to the superior right of all upper proprietors for domestic purposes, and must yield thereto.

All water powers on a stream are established subject to the superior right of all upper proprietors to use water out of the stream for domestic purposes, and if the upper proprietors have grown so large, or become so numerous as to consume most or all of the water, the lower proprietors have no cause of complaint, because it is only what they should have reasonably expected in the growth and development of the country, and subject to which contingency they established their water powers.

³² In addition to taking water from the stream for its own uses, and supplying the same to its inhabitants for domestic and manufacturing purposes, the amended petition avers that the city supplied water to its inhabitants for commercial purposes. If this means only that the city received pay for the water so supplied, and thereby made the water an article of commerce, the averment is of no force. The city having the right to supply water to its inhabitants for domestic and manufacturing purposes, it can make no difference in that right, that the supply is for pay, rather than for nothing. The injury,

if any, to the lower proprietor arises from the taking of the water, and not from the pay received therefor.

It is also averred in the amended petition that the city supplies water to people outside of the city, for domestic, commercial and manufacturing purposes. If such supply to outsiders, or to be transported away from the city for commercial purposes, is sufficient in quantity to materially injure defendants in error, taking into consideration the size of the stream and water supply, the city to that extent is exceeding its right as a riparian proprietor.

The general rule is well stated by Paxson, J., in *Pennsylvania R. R. Co. v. Miller*, 112 Pa. St. 34, 41, 3 Atl. 780, as follows: "The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered, and that any interruption of, or interference with, the rights of the lower riparian owner is an injury for which action will lie, unless too trifling for the law to notice."

³³ The obligation to return the water to the stream without "any essential diminution" means that the water not consumed in the use, or "legal purpose," must be returned to the stream, or an opportunity given for it to flow back into the stream by the ordinary channels. It cannot be lawfully diverted or transported, so as to prevent it from flowing back into the stream.

The city having no right to materially diminish the flow of the water in the stream to the injury of defendants in error, by supplying water to outsiders, or for commercial purposes to be transported to other parts, or to supply to its inhabitants for power purposes an unreasonable quantity as above pointed out, it follows that if the city has materially diminished the flow of the water in the stream, by so supplying water to outsiders, or for transportation, or unreasonably for purposes of power, that it is liable to respond in damages to the party injured thereby; but for the water consumed by the city for its own purposes, or so supplied to its inhabitants for domestic use, even though it received pay therefor, it is not liable.

The water taken by the city from the stream for its own use, and so supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor, and not by virtue of the right of eminent domain, and therefore no compensation need be made therefor.

The general rule that a lower proprietor is entitled to the natural flow of a stream undiminished in quantity, subject to the lawful use of the water by upper proprietors, has been referred to with approval by this court in several cases: Columbus etc. Iron Co. v. Tucker, 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630; City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86. In the Mansfield ³⁴ case there was no question involved as to the volume or quantity of water, the only question being as to the liability of the city for polluting the waters of the stream, and the right of the lower proprietor to recover damages for such pollution. The case of Columbus etc. Iron Co. v. Tucker 48 Ohio St. 41, 29 Am. St. Rep. 528, 26 N. E. 630, was also by lower proprietor against an upper one, for damages for polluting the waters of a stream.

The question as to the pollution of the waters of a stream in this state seems to be fairly well settled by these two Ohio cases, but they do not determine the relative rights of upper and lower riparian proprietors, as to the use of the waters of a stream, as was so strongly urged by counsel for defendants in error.

The court of common pleas erred in its charge to the jury as to the city being an upper riparian proprietor, and as to its right to use water out of the stream for its own purposes, and as to its right to supply water from the stream to its inhabitants for domestic and manufacturing purposes. The real and only question upon which a liability could be founded, viz., whether the flow of the water in the stream was materially diminished, to the injury of the lower proprietors, by the supplying of water by the city to people outside of its limits, or to be transported away from the city for commercial purposes, or by an unreasonable supply of water for power purposes, seems to have been overlooked, and no charge requested or given on that subject.

The circuit court erred in affirming the judgment of the common pleas. Both judgments will be reversed, and the cause remanded for further proceedings.

Spear, Davis and Shauck, JJ., concur.

Cities as Riparian Owners are entitled to the same reasonable use of a stream as any other owner: See the monographic note to *Winchell v. Waukesha*, 84 Am. St. Rep. 911.

Every Riparian Proprietor has a right to the ordinary use of water naturally flowing past his land for domestic purposes without regard to the effect of such use upon the lower proprietor. He also has the right to use it for any purpose whatever, provided he does

not interfere with the rights of other proprietors: *Jones v. Conn*, 39 Or. 30, 87 Am. St. Rep. 634, 64 Pac. 855, 65 Pac. 1068. The rights of riparian owners to the use of water for an artificial purpose are equal. Each has a right to its reasonable use, having reference to the rights of others: *Gehlin v. Knorr*, 101 Iowa, 700, 63 Am. St. Rep. 416, 70 N. W. 757. See, too, *Jones v. Conn*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 87 Am. St. Rep. 634, and cases cited in the cross-reference note thereto.

JOHNSON v. STATE.

[66 Ohio St. 59, 63 N. E. 607.]

HOMICIDE in Commission of Unlawful Act.—To constitute an unintentional homicide, in the commission of an unlawful act, manslaughter, the "unlawful act" must be an act prohibited by the statute law, and not merely an act of gross negligence. (pp. 565, 570.)

CRIMINAL LAW.—There are no Common-law Crimes in Ohio. (p. 567.)

Johnson was indicted for manslaughter in unlawfully killing one Barrows. The defendant, as it was growing dusk in the evening, rode a bicycle, known as a racing machine, noiselessly down the main street of a village at a speed of some twenty miles an hour. He was leaning forward over his bicycle, and was in the position commonly used in bicycle races. Many people were about the streets. He gave no alarm, and he could have seen ahead of him. While so riding, he collided with Barrows, a pedestrian on the street, inflicting injuries from which the latter died. Both saw each other an instant before the collision and sought to avoid it. The defendant did not intend to, and did not purposely, collide with Barrows. The jury was instructed, in part, as follows: "An act lawful in itself when properly performed, may be performed so improperly—that is, so recklessly and wantonly as to render it unlawful, and in such case, if the death of another result directly and proximately therefrom, it is manslaughter; the wanton recklessness or gross negligence, in such a case, supplying the place of direct criminal intent. But inferences of guilt are not to be drawn from remote causes, and the law does not hold a person criminally responsible for slight negligence, nor even for a mere failure to observe or to exercise ordinary care and diligence, but only for gross negligence in the sense that I have above defined that term to you. In other words, to make

it entirely plain to you: The carelessness or negligence with which an act must be done in order to render the death of another resulting therefrom, criminal homicide or manslaughter, must be gross, and such as an ordinarily reasonable and prudent person—that is, a person of ordinary discretion and judgment, might, and reasonably ought to, foresee and anticipate, would endanger the lives and safety of others, and be likely to result in fatal injuries to others.” A general exception to the charge was saved. The defendant was adjudged guilty and sentenced. He prosecuted error to the circuit court, where the judgment of the common pleas was affirmed. He now prosecutes error to this court.

Thomas C. Beatty, for the plaintiff in error.

Henry Bannon, for the defendant in error.

62 PRICE, J. If the conceded facts are sufficient and the charge of the trial court sound law to govern the jury in deciding on such facts, the plaintiff in error may have been properly punished for very reprehensible conduct. That part of the charge contained in the statement of the case as well as a subsequent paragraph which we will notice, were equivalent to directing a verdict of conviction, inasmuch as there was no dispute as to the facts. There was a verdict of conviction and a sentence upon the verdict, which the circuit court sustained, and thereby must have held that the charge correctly stated the law of the case.

The importance of what is presented as an apparently new doctrine in this state, as well as respect for the opinions of both the lower courts, have been sufficient reasons for giving the questions involved a careful consideration.

The indictment for manslaughter in this case is in the short form authorized by section 7217 of the Revised Statutes, and it charges that “Noah Johnson on the twenty-fifth day of May, in the year of our Lord one thousand nine hundred and one, in ⁶³ the county of Scioto, did unlawfully kill one Emory Barrows then and there being, contrary to the form of the statute,” etc.

Prior to the codification of the criminal statutes, manslaughter was thus defined; “That if any person shall unlawfully kill another without malice, either upon a sudden quarrel, or unintentionally while the slayer is in the commission of some unlawful act, every such person shall be deemed guilty of man-

slaughter, and on conviction thereof, be punished," etc.: 1 Swan & C. Ohio Stats. 403.

The statute on the subject now is section 6811 of the Revised Statutes, which reads: "Whoever unlawfully kills another, except as provided in the last three sections is guilty of manslaughter, and shall be imprisoned," etc. The preceding sections define murder in the first and second degrees. But the present section 6811 is not different in substance and meaning from the original section above quoted, and to ascertain the elements of the crime of manslaughter we look to the original as it stood before codification or revision. Therefore, to convict of manslaughter, it is incumbent upon the state to establish that the killing was done "either upon a sudden quarrel, or unintentionally while the slayer was [is] in the commission of some unlawful act."

It is clear that from the facts and the instructions given the jury that Barrows was not killed by Johnson in a quarrel: nor was the killing intentional. Hence, the latter clause of the definition of the crime is the one to which our investigation should be confined. The state was required to show that while the killing was unintentional, it was done by Johnson while he was in the commission of some unlawful act; and the question arises whether the negligent ⁶⁴ act or acts of the slayer, though no breach of any law, may be sufficient to constitute the unlawful act designated in the statute. Or, is the state required to show that he was in the commission of an act prohibited by law?

At the time of this homicide there was even no ordinance of the village of Scioto regulating the speed or manner of riding bicycles upon its streets. None appears in the record, and we therefore assume there was no such ordinance. And it is not claimed that there was any statute then in force on that subject. What, then, is the proper construction of the clause "while in commission of some unlawful act"?

The construction which prevailed in the lower courts is found again in a portion of the charge which we quote as the final admonition to the jury: "Now, gentlemen, apply these principles to the case and determine from the evidence introduced upon the trial whether the defendant, Noah Johnson, at the time he struck and killed the decedent, Emory Barrows, was riding his bicycle with gross negligence, and was it such as an ordinary, reasonable and prudent person might and reasonably ought to have foreseen would endanger the lives and

safety of others, and be likely to produce fatal injuries; and was such killing the direct, natural and proximate result of such negligence? If the evidence satisfies you beyond a reasonable doubt of all these matters, then your verdict should be that the defendant is guilty of manslaughter as he stands charged in the indictment; otherwise you should acquit him."

In this language the trial court told the jury that in the defendant's conduct in the manner of riding the bicycle—its speed without signal of a bell—was, in their judgment, grossly negligent, it was an unlawful ⁶⁵ act, and they might find that in such conduct he was committing an unlawful act, and, if it resulted in the death of Barrows, the rider was guilty of manslaughter. And it was left to the jury, and they were directed to determine from the evidence whether or not the acts done were grossly negligent and regardless of the life and safety of another. If so, to convict.

We have no common-law crimes in this state. We think such has been the uniform understanding of the bar, and the opinion of both the judicial and legislative departments of our commonwealth. Before the trial of this case there was but one other case brought to our attention where the proposition has been called in question: *Weller v. State*, 10 Ohio Cir. Dec. 381, 19 Ohio C. C. 166.

But this court has settled the commonly accepted rule in more than one case. In *Suteliffe v. State*, 18 Ohio, 469, 477, 51 Am. Dec. 459, Justice Avery, speaking for the court, says: "There is no common-law crime in this state, and we therefore look always to the statute to ascertain what is the offense of the prisoner, and what is to be his punishment." Again, on same page: "What is affirmed in this statute of manslaughter of the character which this court is intended to reach, except that the slayer must be in the commission at the time of some unlawful act?" Also on page 477: "It is claimed for the plaintiff in error that there is no allegation in the count of the unlawful act designated in the statute. It was necessary to allege in the indictment that the person was engaged in the commission of some unlawful act. And this allegation, it appears to the court, is distinctly made in that part of the indictment which ⁶⁶ charges the prisoner with an assault upon the person killed, and unlawfully discharging and shooting off at him a loaded gun. This sufficiently declares an unlawful act."

As before stated, our statute now provides for a shorter form of indictment, but it does not dispense with the ingredients of manslaughter as defined in the former statute.

In *Smith v. State*, 12 Ohio St. 466, 469, 80 Am. Dec. 355, this court says: "It must be borne in mind that we have no common-law offenses in this state. No act or omission, however hurtful or immoral in its tendencies, is punishable as a crime in Ohio, unless such act or omission is specially enjoined or prohibited by the statute law of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law."

The same statement of the law was again made in *Mitchell v. State*, 42 Ohio St. 383, and other decisions of this court.

We think the same rule abides in many, if not all the other states of the Union whose legislatures have made codes or systems of statutory crimes. It evidently is true of the federal government as settled by repeated decisions of the supreme court of the United States: *United States v. Worrall*, 2 Dall. 384, Fed. Cas. No. 16,766; *United States v. Hudson*, 7 Cranch, 32; *Pennsylvania v. Wheeling etc. Bridge Co.*, 13 How. 518, and later cases in that court. When our legislature first enacted statutes upon the subject of homicide and defining its different degrees, it did, as to manslaughter, what the state suggests, adopted almost literally the common-law⁶⁷ definition: *Suteliffe v. State*, 18 Ohio, 469, 82 Am. Dec. 459. But when this definition was borrowed and adopted by our legislature, it was adopted, not in part, but as a whole, and the act committed when the unintentional killing occurs, must be a violation of some prohibitory law. The very word "unlawful," in criminal jurisprudence, means that and nothing less. Surely the legislature did not intend to adopt part of the common-law description of the offense as a statutory provision, and leave the other part to the expansiveness of the common law. Yet, that is practically the construction which the lower courts must have placed upon our statute against manslaughter. We assume that the facts show conduct grossly negligent in character. There was no malice and no quarrel between defendant and the deceased. The killing was unintentional. It was manslaughter nevertheless, if the slayer was then in commission of some unlawful act. The jury were told that if, in their judgment, the accused was guilty of gross negligence, and a disregard for the lives and safety of others, the

state was entitled to a verdict of manslaughter. In considering this rather unusual, if not new construction of the law, we must not forget a few elementary principles of the law of negligence. It (negligence) may consist of acts of omission as well as commission; and what may be mere ordinary negligence under one class of circumstances and conditions, may become gross negligence under other conditions and circumstances. Negligence is the failure to exercise ordinary care. Gross negligence may consist in failure to exercise any or very slight care. There are other definitions, but these are sufficient now for our purpose. So we may truly say that negligence differs only in degree. With this, we cannot overlook what ⁶⁸ experience has taught for many years, that what may seem ordinary negligence when contemplated by one mind may be regarded by another as very gross negligence. The inferences drawn from the same facts by different minds may often greatly differ. Hence, when we look to the case as it appeared, in the trial court, we see, that without any rule of conduct prescribed by statute to govern the case, the rule for the first time was to be established by the verdict of the jury and sentence of the court.

Up to that time the behavior of the defendant had violated no law. It was for the jury to say, under the instructions given, whether the accused had been guilty of gross negligence. If so, although the killing was unintentional and free from malice, it was manslaughter. In England, the home of the common law and where it attained its wonderful growth, and from which we have borrowed to a large extent, it became necessary and was permissible to build up, by the pen of law-writers and adjudged cases a system of criminal jurisprudence, and enforce it until parliament would occupy the ground and supplant it. But that country, while so doing, was under no written constitution, and ex post facto, or retroactive laws might be laid down by the courts or enacted by parliament. Not so in this country where we have a written constitution prohibiting retroactive and ex post facto legislation. Weeks or months after the negligent acts involved in this case, we have the rule of conduct of the defendant passed upon and defined by a verdict upon the all important and indispensable element of manslaughter based on the facts of the case, It is retroactive in its effect. An act of the legislature attempting to so operate would be promptly held unconstitutional. ⁶⁹ Can we sustain a construction of our statute against manslaughter which will have the same effect?

In our judgment the unlawful act, the commission of which gives color and character to the unintentional killing, is an act prohibited by law, and that such is the natural meaning of the term or clause when used in the parlance of criminal jurisprudence.

Another observation is appropriate here: The uncertainty of the common law. Some principles which are deemed common law in Ohio are not so regarded in other states, and what some of them regard as common law, we do not recognize as such in Ohio. Therefore, the wisdom of enacting a system of penal laws at the beginning of our statehood, and of improving and expanding it as fast as conditions of society required. The growth of such legislation is itself against the holdings of the lower courts. What acts or omissions in early years were harmless, owing to the sparsity of population and character of property and business then owned and conducted, afterward, as population increased, and business relations became diversified, became injurious to others; and in other respects the good order of society and the protection of life and property demanded and received appropriate legislation. That department of our state government has kept pace with the wrongs, the vices and immoralities of our social and industrial life. It has gone further, when occasion demanded, and has made criminal many acts and omissions which before belonged to the field of negligence, as witness, many provisions regarding the management of railroads, factories and mines, and other branches of business where labor is employed. Many acts or omissions to act, which before were subject to ⁷⁰ the charge of negligence are made penal by statute. And a consideration of this course of legislation demonstrates that there is no longer a necessity to turn to the common law to find what act or acts it is unlawful to commit.

If the contention of the state in this case is tenable, it is not difficult to see how the criminal dockets in our courts will soon be flooded. The gross negligence of one may unintentionally cause the death of many. If such negligence is the commission of an unlawful act, the killing of each of the slain becomes a separate crime of manslaughter. And so it would proceed, and the cases multiply according to the judgment of men, as to when the acts of others are or are not grossly negligent.

The position is untenable, and we decide that the judgments of the common pleas and circuit courts are erroneous and must

be reversed, and the facts of this case being conceded, as stated herein, the plaintiff in error is discharged.

Burket, Davis and Shauck, JJ., concur.

UNINTENTIONAL HOMICIDE IN THE COMMISSION OF AN UNLAWFUL ACT.

I. The Unlawful Act and What Constitutes It.

- a. Involuntary Manslaughter, in General.
- b. Negligence as an Unlawful Act.
- c. Acts Mala Prohibita—Reckless Driving.
- d. Misdemeanors and Felonies.

II. Homicide in the Perpetration of Particular Offenses.

- a. In the Course of Assaults and Combats.
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 1. General Rule—Illustrations.
 2. Pointing a Gun or Pistol at Another.
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I. The Unlawful Act and What Constitutes It.

a. Involuntary Manslaughter, in General.—Involuntary manslaughter has been defined to be the unlawful killing of a human being, without malice, either express or implied, and without intent to kill or inflict an injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself: Johnson v. State, 94 Ala. 35, 10 South. 667. See, also, Brown v. State, 110 Ind. 486, 11 N. E. 447; State v. Abarr, 39 Iowa, 185; Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; Nelson v. State, 6 Baxt. (Tenn.) 418. This definition includes homicide resulting from the negligent performance, without actual criminal intent, of a lawful act. And undoubtedly the common-law rule is, that criminality may

be affirmed of a lawful act carelessly or negligently done. The negligence, however, must be aggravated, culpable, or gross. That is, it must be such a departure from what would be the conduct of an ordinarily prudent or careful man under the same circumstances as to evidence a disregard of human life or an indifference to consequences. The negligence in such cases supplies, in a measure, the direct criminal intent. Familiar illustrations of this principle are the reckless use or handling of firearms, and the casting of stones or timbers from a housetop into the street where people are known to be passing: *Fitzgerald v. State*, 112 Ala. 34, 20 South. 966; *York v. Commonwealth*, 82 Ky. 360; *Smith v. Commonwealth*, 93 Ky. 318, 20 S. W. 229; *Commonwealth v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 391. Forcibly seizing a boy against his will and protest and carrying him into deep water in a river, where he is drowned, is manslaughter: *State v. Radford*, 56 Kan. 591, 44 Pac. 19. And a mere act of omission, on the part of a switchtender for example, may be so criminal or culpable as to be the subject of indictment for manslaughter: *State v. O'Brien*, 32 N. J. L. 169. Negligent homicide by omission, however, presupposes a duty to perform the act omitted. Thus, a brakeman upon a locomotive, which is under the exclusive control of the engineer and fireman, is not criminally responsible for the death of a child run over by the locomotive: *Anderson v. State*, 27 Tex. App. 177, 11 Am. St. Rep. 189, 11 S. W. 33.

The doctrine that when one does a lawful act in such a reckless, careless manner that it is calculated to endanger human life, and death ensues, he is guilty of a criminal homicide, although the death of the person killed was not intended, probably does not extend to careless acts committed with fatal results under circumstances or at a place from which it might reasonably be inferred that no injury would result: *Chrystal v. Commonwealth*, 9 Bush (Ky.), 669. And if one in doing a lawful act, without any intention to do bodily harm, and using proper precaution, happens to kill another, the law excuses him. But accidental killing, wholly to be excused, must be caused in the doing of some lawful act: *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 417.

b. Negligence as an Unlawful Act.—In the principal case (*Johnson v. State*, ante, p. 564), it is decided that, in a prosecution for manslaughter grounded on a homicide unintentionally committed while the defendant was in the perpetration of an unlawful act, it must be shown that the alleged unlawful act is prohibited by statute, it not being sufficient to establish that such act is a crime at the common law, or one of gross and culpable negligence. The soundness of this decision, made as it was under a statute defining manslaughter substantially, if not literally, as it is defined at the common law, may well be doubted. It proceeds on the theory that the "unlawful act" must be one denounced by statute as a specific crime, there being in Ohio, as is true of many of the American

commonwealths, no common-law crimes. We are not aware that gross and culpable negligence is of itself criminal at the common law, yet, as has already been seen, a homicide unintentionally caused in the course thereof might amount at least to manslaughter; and the Ohio statute is a declaration of the common-law definition of manslaughter.

In *State v. Dorsey*, 118 Ind. 167, 10 Am. St. Rep. 111, 20 N. E. 777, a railroad engineer was indicted for involuntary manslaughter for causing the death of a passenger by negligently running his locomotive into a car. "At common law," said Justice Berkshire, in delivering the opinion of the court, "there is no question but that the indictment would be good. The authorities in that direction are abundant, some of which we will cite: Bishop's Criminal Law, 7th ed., sec. 314; Wharton's Criminal Law, secs. 130, 329 et seq.; *State v. O'Brien*, 32 N. J. L. 169; *Commonwealth v. Kuhn*, 1 Pittsb. Rep. 13; *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346; *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76, 20 N. E. 132; *Commonwealth v. Hartwell*, 128 Mass. 415, 35 Am. Rep. 391; Moore's Criminal Law, sec. 863; Gillett's Criminal Law, sec. 502. The common-law definition, as given by Blackstone, is as follows: 'The unlawful killing of another without malice, express or implied, which may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act': 4 Blackstone's Commentaries, 191. The statutory definition of involuntary manslaughter is, word for word, the same as Blackstone's.

"There is nothing to be found in the section defining this crime, or elsewhere in the statute, to indicate that the words 'unlawful act' are to have a different interpretation than that given to them at common law. And the legislature having borrowed the common-law definition of involuntary manslaughter, it is fair to presume, there being nothing to indicate to the contrary, that it was the legislative intention that the statute should be construed in the light of the common law. . . . The words 'unlawful act,' as used in the section of the statute relating to involuntary manslaughter, are not technical words, therefore they are to have their plain or usual meaning. Webster defines the word 'unlawful' as follows: 'Not lawful; contrary to law; illegal; not permitted by law.' . . . The word 'unlawful,' as defined by Bouvier in his law dictionary, is: 'That which is contrary to law.' Another definition is: 'Unlawful implies that an act is done or not done as the law allows or requires': Anderson's Law Dictionary. 'Lawful, unlawful, and illegal refer to that which in its substance is sanctioned or prohibited by the law': Anderson's Law Dictionary. 'The reader should bear in mind that "unlawful" signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution': 2 Bishop's Criminal Law, sec. 178. 'A lawful act done in an unlawful or negligent manner is in law an unlawful act': *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346. . . . We do not

mean to be understood as holding that every careless or negligent act whereby death ensues constitutes malice; far from it. To constitute manslaughter, the act causing death must be of such a character as to show a wanton or reckless disregard of the rights and safety of others, but not necessarily an act denounced by the statute as a specific crime."

Again, in *State v. Moore*, 25 Iowa, 128, 95 Am. Dec. 776, in a prosecution for causing the death of a woman by procuring an abortion, it was admitted that at the common law the perpetrator would be guilty of murder, but it was contended that under the statutes of Iowa that doctrine did not apply. "Our view," remarked Chief Justice Dillon, "is this: Our statute defines murder in the language of the common-law definition of that offense. As at common law, malice, express or implied, is the essential and distinguishing element of murder. Taking sections 4191 and 4193 together, the proper construction is, that what would be regarded as murder in a common-law court would be regarded as murder under our statute. . . . The fundamental proposition of the defendant's argument is, that in Iowa malice cannot be implied from the doing of any act whatever, no matter what its tendency, unless such act is expressly made a crime by statute.

"It would result from this that if there was no statute in Iowa forbidding persons from putting an obstruction on a railroad track, and one were willfully and purposely put there, causing death, the party doing this act, if he did not intend to produce death, could not be convicted of murder, for the reason that malice, in Iowa, cannot be implied from an act not made unlawful by statute. In this state we have no statute specifically forbidding a person in a crowded city from throwing a heavy and dangerous beam from a high building, likely to injure passers-by. At common law, if this be done and death happen, the law would imply malice. But in Iowa, under the doctrine contended for, the party doing an act evincing such an utter and wanton disregard of moral and social duty would not be guilty, even though death be caused thereby, of murder, or even manslaughter. These are put by way of illustrations of the consequences of the doctrine maintained by counsel."

The doctrine advanced by these Indiana and Iowa cases meets our hearty approval. It is in harmony with the solicitude of our system of jurisprudence for the personal safety of every human being. It is sound in principle, and is opposed to no authority that our research has revealed, except the principal case. The Ohio court, in rendering its decision, makes no reference to these cases, nor are they cited by counsel. It seems probable, therefore, that they were not considered.

c. *Acts Mala Prohibita*—*Reckless Driving*.—The mere unlawfulness of an act will not make the doer criminally liable for its unforeseen and undesigned consequences, when such act is neither

dangerous in its nature nor dangerous from the manner of its execution. It seems that the unlawful act, as the term is used in the present discussion, must be an act bad in itself. The law makes the distinction that if the act the party was doing was merely *malum prohibitum*, he is not punishable for the act arising from misfortune or mistake; but if it is *malum in se*, it is otherwise. Thus, if one, while violating an ordinance against fast driving, causes the death or injury of another, the violation of the ordinance does not in itself supply the criminal intent necessary to sustain a charge of assault and battery or of manslaughter: *People v. Pearne*, 118 Cal. 154, 50 Pac. 376; *Commonwealth v. Adams*, 114 Mass. 323, 19 Am. Rep. 362. So, where one drives through a tollgate, attempting to evade the payments of toll, and in frustration of the design the keeper tries to stop the team and is killed, the mere unlawfulness of the driver's act does not, per se, render him amenable to the criminal law. The jury should be told that he was guilty of manslaughter, "if he did the unlawful act in question under conditions that were dangerous to the tollgate keeper; as, if he drove through the gate at a rapid pace, or urged his team of mules on after they had been seized by the deceased; or if from their known fractiousness it was hazardous to stop them—the criminality consisting of the two elements, of the unlawfulness of the act, and the unlawfulness and danger in the mode of its execution": *Estell v. State*, 51 N. J. L. 182, 17 Atl. 118. In *Thompson v. State*, 131 Ala. 18, 31 South. 725, it was held that horseracing along a public road is unlawful, and if a homicide is caused thereby, it may amount to manslaughter in the second degree, regardless of whether the running was furious, reckless, and grossly negligent.

d. **Misdemeanors and Felonies.**—A homicide unintentionally committed in the perpetration of an offense below the degree of felony amounts to manslaughter: *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *State v. McNab*, 20 N. H. 160. Some authorities, while recognizing this as the statutory rule, seem to affirm that at the common law a homicide occasioned by a misdemeanor, or an attempt to commit one, may be murder: See *People v. Rector*, 19 Wend. 569, 592.

A homicide committed in the perpetration, or attempt to perpetrate, a felony, may be murder, even in the first degree, whether there was any precedent intention of doing the homicidal act or not. The intention to commit the original felony supplies the malicious intent as to the one actually committed. Or a purpose to kill is conclusively presumed from the intention which is the essence of the felony pursued, and the perpetration of such felony stands in lieu of the premeditation and deliberation necessary to constitute murder. In a prosecution for such an offense, it is not necessary to aver in the indictment that the homicide was committed in the perpetration of a felony: *Kilgore v. State*, 74 Ala. 1; *People v. Bealoba*, 17 Cal. 389; *State v. Boice*, 1 Houst. C. C. (Del.) 355; *State v. Hop-*

kirk, 84 Mo. 278; State v. Meyers, 99 Mo. 107, 12 S. W. 516; Henry v. State, 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; Morgan v. State, 51 Neb. 672, 71 N. W. 788; Ex parte Dela, 25 Nev. 346, 83 Am. St. Rep. 603, 60 Pac. 217; People v. Van Steenburgh, 1 Park. Cr. Rep. (N. Y.) 39; Cox v. People, 80 N. Y. 500; Commonwealth v. Flanagan, 7 Watts & S. 415; Singleton v. State, 1 Tex. App. 501. The hardship of this rule, as applied to special cases, has often been deplored, yet it is regarded as in accordance with the common law and is generally established by statute: See Commonwealth v. Chance, 174 Mass. 245, 75 Am. St. Rep. 306, 54 N. E. 551; Rupe v. State (Tex. Cr. App.), 61 S. W. 929.

To sustain a conviction of murder in the first degree, under a statute providing that any person who, while engaged in the perpetration of a felony, kills another, shall be deemed guilty of murder in the first degree, it is not essential that the killing be such as, in the absence of such statute, would amount to murder as distinguished from manslaughter: Henry v. State, 51 Neb. 149, 66 Am. St. Rep. 450, 70 N. W. 924; note to Whiteford v. Commonwealth, 18 Am. Dec. 786.

II. Homicide in the Perpetration of Particular Offenses.

a. In the Course of Assaults and Combats.

1. **Resulting in the Death of One Party.**—An assault and battery made without a deadly weapon, and with an intent to do merely bodily harm, and not to kill, is only a misdemeanor, and if the assailant unintentionally kills his adversary in the pursuit of his unlawful purpose, he will ordinarily be guilty of manslaughter, but not of murder: People v. Munn, 65 Cal. 211, 3 Pac. 650, as where he strikes him with his fist, with unjustifiable violence: People v. Denomme (Cal.), 56 Pac. 98; or, provoked by insulting words, pushes a woman over a lamp, and she dies from burns received: State v. Trusty, 1 Penne. (Del.) 319, 40 Atl. 766. But in Lax v. State (Tex. Cr. App.), 65 S. W. 88, where the defendant and deceased met in the road, and the former precipitated a fight, in which the deceased retreated across the fence, whereupon the defendant threw a stick and killed him, it was held that the evidence did not support a verdict for manslaughter, it being shown that there was not a specific intent to kill.

An assault and battery may be committed under such circumstances or in such a manner as to make the killing, if it results, murder, though there was no formed design to take life: State v. Alexander, 30 S. C. 74, 14 Am. St. Rep. 879, 8 S. E. 440; McWhirt's Case, 3 Gratt. (Va.) 594, 46 Am. Dec. 196. But if a deadly weapon is not used, the intent must be clearly felonious to make the killing murder: People v. Munn, 65 Cal. 211, 3 Pac. 650; Wellar v. People, 30 Mich. 16. If a husband beats his wife, causing her death, he is guilty of manslaughter at least: Commonwealth v. McAfee, 108

Mass. 458, 11 Am. Rep. 383. And an assault upon her by which she is killed has been held murder in the first degree, though there was no specific intent to kill: *State v. Nueslein*, 25 Mo. 111. In *Mayes v. People*, 106 Ill. 306, 46 Am. Rep. 698, it appeared that the defendant, angry and drunken, without provocation threw a beer glass at his wife, which struck a lamp she was carrying, breaking it and causing it to fatally burn her. His daughter and mother in law were also in the room. It was held, in sustaining his conviction of murder, immaterial whom he intended to strike, or whether he had any specific intent, but that the act showed an abandoned and malignant heart, and malice was implied. See, also, *Griffin v. State*, 40 Tex. Cr. Rep. 312, 76 Am. St. Rep. 718, 50 S. W. 366.

2. In the Death of a Third Person.—In case one assaults another, and while engaged therein kills a third person, who interferes in the proper defense of the party assaulted, he is guilty of the same degree of homicide as though he had killed the party attacked: *State v. Benton*, 2 Dev. & B. (N. C.) 196; *Thornton v. State* (Tex. Cr. App.), 65 S. W. 1105. If, on the other hand, the party assailed, in the lawful exercise of the right of self-defense, accidentally and unintentionally kills a third person, he is guilty of no crime: *Pinder v. State*, 27 Fla. 370, 26 Am. St. Rep. 75, 8 South. 837; *Plummer v. State*, 4 Tex. App. 310, 30 Am. Rep. 165. But where two persons assault a third, who in attempt to shoot them kills another by mistake, the assaulting parties are not guilty of, or responsible for, such killing, when there was nothing in the character of the assault to justify a prudent man in resorting to a revolver, and there was no concert of action, and no common design or purpose between them and the assaulted party: *Butler v. People*, 125 Ill. 641, 8 Am. St. Rep. 423, 18 N. E. 338.

3. In the Death of an Unborn Child.—At the common law it seems that an unborn child is not considered a person who can be killed within the description of murder: *State v. Prude*, 76 Miss. 543, 24 South. 871. But, however this may be, it is held that the murder of an infant may be committed through injury inflicted on it by beating its mother while it remains in the womb, if it dies therefrom after being born: *Clarke v. State*, 117 Ala. 1, 67 Am. St. Rep. 157, 23 South. 671. In Florida, it is manslaughter to cause the premature birth and death of a child by an assault and battery on the mother with a club: *Williams v. State*, 34 Fla. 217, 15 South. 760.

b. In the Course of a Mutual Combat.—It is at least manslaughter if two persons propose and accept a combat, without previous malice, and one kills the other with a deadly weapon: *Atkins v. State*, 16 Ark. 568. So it is considered at least manslaughter if two struggle or fight in anger, and the death of one is occasioned thereby, without the use of a weapon: *Regina v. Canniff*, 9 Car. & P. 359. Where a challenge to fight and an acceptance are with intent to engage in an ordinary personal encounter, without any intent to kill, and one

of the parties is killed, the offense is not greater than manslaughter, though it might be murder if the combat was entered into with the purpose of killing: *Stringfellow v. State* (Tex. Cr. App.), 61 S. W. 719.

c. By Abandoning or Exposing a Child.—If a parent abandons a child of tender age and exposes it to the inclemency of the weather, thereby intending to accomplish its death, such parent is guilty of an assault with intent to kill. But if the exposure or neglect is an act of mere carelessness, wherein danger of life does not clearly appear, the homicide is manslaughter only, though it may be murder if the exposure or neglect is of a dangerous character: *Pallis v. State*, 123 Ala. 12, 82 Am. St. Rep. 106, 26 South. 339; *State v. Behm*, 72 Iowa, 533, 34 N. W. 319; *Gibson v. Commonwealth*, 106 Ky. 360, ante, p. 230, 50 S. W. 532.

d. By Burning a Building.—Where one willfully, maliciously, and feloniously sets fire to and burns a building occupied as a residence, and thereby causes the death of an occupant, he may be guilty of murder, notwithstanding he may not have intended or calculated such death as a result of the burning. The law transfers the felonious intent and purpose with which the burning was done to the natural result and consequence: *Reddick v. Commonwealth*, 17 Ky. Law Rep. 1020, 33 S. W. 416.

e. By Procuring an Abortion.—Some authorities advance the doctrine that under the common law it is murder to cause the death of a woman by procuring an abortion on her, when not necessary to the preservation of her life, though there was no intent to kill her, but only to produce the miscarriage: See *Commonwealth v. Parker*, 9 Met. 263, 43 Am. Dec. 396; *People v. Sessions*, 58 Mich. 594, 26 N. W. 291; *State v. Dickinson*, 41 Wis. 299. Moreover, this rule seems to have been adopted in some of the American commonwealths: See *State v. Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312; *State v. Alcorn* (Idaho), 64 Pac. 1014; *State v. Moore*, 25 Iowa, 128, 95 Am. Dec. 776; *Ex parte Fatheree*, 34 Tex. Cr. Rep. 594, 31 S. W. 403. The correctness of this as a common-law rule is doubtful; for at the common law it was at most but a misdemeanor to cause an abortion. To hold, then, that the offense is murder in case the woman's death is accidentally and unintentionally occasioned is contrary to the law that an unintentional death occurring in the perpetration of a misdemeanor is only manslaughter. It is not improbable that the term "murder" has been used in this connection in a sense other than its technical meaning. But whatever may have been the law, and whatever may have been its justification in days when little was known of surgery and of the use and properties of drugs, it is clear to us that no such rigorous rule should find countenance at the present time. However dangerous may have been the operation then, it is a matter of common knowledge that the death of the mother is not the usual, nor the probable, consequence of an abortion. "In these

days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of this crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life into her hands when she submits to an abortion, be she wife or maid, but her death is no necessary element in the procuring of the abortion; and the application of the harsh rule contended for would have no effect in the repression of that abhorrent crime, which can be efficiently dealt with only by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child." It is believed that if the abortion is performed with no intent to inflict serious injury upon the mother, and in such a manner as not likely, per se, to inflict such injury, that the offense is only manslaughter in the event of the woman's death: *Yundt v. People*, 65 Ill. 372; *People v. Commonwealth*, 87 Ky. 487, 9 S. W. 509, 810; *Wilson v. Commonwealth*, 22 Ky. Law Rep. 1251, 60 S. W. 400; *Worthington v. State*, 92 Md. 222, 84 Am. St. Rep. 506, 48 Atl. 355; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607; *People v. Abbott*, 116 Mich. 263, 74 N. W. 529; *Commonwealth v. Railing*, 113 Pa. St. 37, 4 Atl. 459; *State v. Power*, 24 Wash. 34, 63 Pac. 1112; *Hatchard v. State*, 79 Wis. 357, 48 N. W. 380.

f. In Perpetrating a Burglary.—A homicide committed in the perpetration of, or in the attempt to perpetrate, a burglary may be murder in the first degree, though not committed with a deliberate and premeditated design to kill. And a burglar is within this rule while engaged in any of the acts immediately connected with his crime until he leaves the building with his plunder: *State v. Miller*, 100 Mo. 606, 13 S. W. 832, 1051; *Dolan v. People*, 64 N. Y. 485; *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180; *Hedrick v. State* (Tex. Cr. App.), 51 S. W. 252. It seems obvious that this rule of law may, in some instances, operate with unjust severity; and this is quite as true in case of robberies and other felonies, as has been before suggested.

g. In Perpetrating a Robbery.—One who kills another in the commission of, or in the attempt to commit, a robbery may be guilty of murder in the first degree, notwithstanding the homicide was unintentional or without a deliberate and premeditated design: *People v. Vasquez*, 49 Cal. 560; *People v. Mooney*, 2 Idaho, 24, 2 Pac. 876; *Moynihan v. State*, 70 Ind. 126, 36 Am. Rep. 178; *State v. Schmidt*, 136 Mo. 644, 38 S. W. 719; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *State v. McGinnis*, 158 Mo. 105, 59 S. W. 83; *State v. Gray*, 19 Nev. 212, 8 Pac. 456; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *Robertson v. Commonwealth* (Va.), 20 S. E. 362; *Gonzales v. State*,

19 Tex. App. 394; *Giles v. State*, 23 Tex. App. 281, 4 S. W. 886; *Isaacs v. State* (Tex. Cr. App.), 38 S. W. 40. This rule is not varied, it is held, by the fact that the deceased fired the first shot: *Smith v. State*, 31 Tex. Cr. Rep. 14, 19 S. W. 252.

The killing of a human being by one in an attempt to escape from an officer's custody, or from jail, has been held murder in the first degree, where such attempt to escape is made a felony by statute: *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *People v. Wilson*, 145 N. Y. 628, 40 N. E. 392.

h. By Administering Poison.—Poison may be carefully and innocently administered for a lawful purpose, and yet produce death, in which event no crime will have been committed. So homicide committed by poison heedlessly or incautiously administered for no unlawful purpose will at most amount only to manslaughter. But if poison is knowingly administered with the intention of mischief and to accomplish an unlawful design, and death ensues, the offense will be murder, although death was not intended: *State v. Wagner*, 78 Mo. 644, 47 Am. Rep. 131. See, also, *State v. Dowd*, 19 Conn. 388; *Bechtelheimer v. State*, 54 Ind. 128; *Cann v. State*, 11 Humph. (Tenn.) 159. Poisoning a well with intent to kill is murder, though the intent was to kill a person other than the deceased: *State v. Evans*, 1 Mary. (Del.) 477, 41 Atl. 136. And when convicts in a state prison administer chloroform to a guard, to facilitate their escape, and he dies in consequence, it has been held murder in the first degree: *State v. Wells*, 61 Iowa, 629, 47 Am. Rep. 822, 17 N. W. 90. So, it is held that administering morphine and chloral with drinks, for the purpose of robbing a person, amounts to murder in the first degree, if his death is thereby occasioned without an intent to kill: *Rupe v. State* (Tex. Cr. App.), 61 S. W. 929. The general rule is, that there can be no conviction of murder in the first degree where there was no purpose or intent to kill the person poisoned, such purpose or intent being an essential ingredient of that degree of homicide: *Robbins v. State*, 8 Ohio St. 131.

i. In Perpetrating Rape or Sodomy.—A homicide committed by one while engaged in the perpetration of a felony, such as rape or sodomy, is murder, and the absence of proof of premeditation or pre-conceived design to kill is insufficient to reduce the crime to manslaughter: *State v. Deschamps*, 42 La. Ann. 567, 21 Am. St. Rep. 392, 7 South. 703. A homicide in committing rape is murder, though there was no malice, and the woman was killed by striking her head on the floor to keep her quiet, without intent to kill: *State v. Cross*, 72 Conn. 722, 46 Atl. 148. The statutes often make homicide committed in the perpetration of rape murder in the first degree, the turpitude of the act being made to supply the place of the deliberate and premeditated malice: See *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621; *Buel v. People*, 78 N. Y. 492, 34 Am. Rep. 555.

j. In Wrecking a Train.—It is murder to place an obstruction on a railroad track with intent to wreck a train, in consequence of which a human being is killed. It is a homicide proceeding from that depravity of mind and heart known as “universal malice”: *Presley v. State*, 59 Ala. 98. In *State v. Brown*, 1 Houst. Cr. Cas. (Del.) 539, a verdict of guilty of manslaughter was returned against one convicted of trainwrecking.

k. In Attempting Suicide.—One who, in an unsuccessful attempt to commit suicide, accidentally kills another who is trying to prevent it, is guilty of criminal homicide: *Commonwealth v. Mink*, 123 Mass. 422, 25 Am. Rep. 109. If suicide is considered a felony, then such unintentional killing of another is regarded as murder: *State v. Levelle*, 34 S. C. 120, 27 Am. St. Rep. 799, 13 S. E. 319. It has been held that where one takes his own life upon the advice of another, the adviser is guilty of murder as principal: *Commonwealth v. Bowen*, 13 Mass. 356, 7 Am. Dec. 154.

l. In Recklessly Using Firearms.

1. General Rule—Illustrations.—The unintentional killing of a human being, through the negligent handling of firearms in a manner indicating a recklessness incompatible with human life, is manslaughter: *State v. Grote*, 109 Mo. 345, 19 S. W. 93. See, also, *Pool v. State*, 87 Ga. 526, 13 S. E. 556; *Burton v. State*, 92 Ga. 449, 17 S. E. 99; *Minton v. Commonwealth*, 79 Ky. 461. Firing at a target with a rifle in proximity to roads and houses, without taking any precautions to prevent danger, is manslaughter if a person in the vicinity is killed: *Queen v. Salmon*, 6 Q. B. D. 79. One shooting in the streets of a town in violation of law, and killing a person, is criminally liable therefor: *Sparks v. Commonwealth*, 3 Bush (Ky.), 111, 96 Am. Dec. 196; and if one carelessly discharges a gun into the highway when it is dark, and unintentionally kills a passing person whom he does not see, the killing is manslaughter: *People v. Fuller*, 2 Park. Cr. Rep. (N. Y.) 16. Recklessly firing a gun in the range of the deceased, with no intention to kill or wound, is at least manslaughter, though the gun was pointed in that direction by accident: *State v. Vance*, 17 Iowa, 138. In this case the deceased was a trespasser in a melon patch. And one who shoots in fun at another is responsible for the consequences. The law implies malice from the reckless trifling with human life: *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449.

2. Pointing a Pistol or Gun at Another.—Where one points a gun or pistol at another in a reckless or negligent manner or in sport or play, without any intention to take life or do bodily harm, and it is accidentally or unintentionally discharged, killing him, the offense is manslaughter: *Cook v. State*, 93 Ga. 200, 18 S. E. 823; *State v. Tippet*, 94 Iowa, 646, 63 N. W. 445; *Murphy v. Commonwealth*, 15 Ky. Law Rep. 215, 22 S. W. 649; *State v. Morrison*, 104 Mo. 638, 16 S. W. 492. It is no defense that the victim told the offender to shoot: *State v. Vines*, 93 N. C. 493, 53 Am. Rep. 466. In-

deed it has been said that he may well be convicted of murder: *Meyers v. State* (Miss.), 23 South. 428. Under some circumstances, on the other hand, the homicide has been considered excusable: *Williamson v. State*, 2 Ohio Cir. Ct. Rep. 292, 1 Ohio C. D. 492; *Robertson v. State*, 2 Lea (Tenn.), 239, 31 Am. Rep. 602. Statutes have been enacted making this foolhardy practice a misdemeanor, and under them the offense is regarded as manslaughter: *Henderson v. State*, 98 Ala. 35, 13 South. 146; *Barnes v. State* (Ala.), 32 South. 670; *State v. Goodley*, 9 Houst. (Del.) 484; *Surber v. State*, 99 Ind. 71. And the only element of illegality necessary to constitute a violation of the statute, and to make the act an unlawful one within the meaning of involuntary manslaughter is, that the offender intentionally point the muzzle of the firearm at the victim: *Siberry v. State*, 149 Ind. 684, 39 N. E. 936. If the latter seizes the gun and struggles to save himself from the threatened injury, and it is accidentally discharged, the homicide is not excusable: *State v. Benham*, 23 Iowa, 154, 92 Am. Dec. 417.

3. **Shooting to Frighten.**—If one fires a gun or pistol to frighten others, and death is produced, the killing is at least manslaughter. It is no defense that he did not intend to kill or do bodily harm, and that he may have had good reason to believe the weapon was not loaded, or that, being loaded, it would do no injury: *State v. Hardie*, 47 Iowa, 647, 29 Am. Rep. 496; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; *Reddick v. State* (Tex. Cr. App.), 47 S. W. 993.

4. **Killing a Third Person.**—Shooting at one person, without justification or excuse, and killing another not aimed at, is either manslaughter or murder: *Wills v. State*, 74 Ala. 21; *Clark v. State*, 19 Tex. App. 495. Convictions of manslaughter for this offense are upheld in *Smith v. Commonwealth*, 19 Ky. 1073, 42 S. W. 1138; *State v. Salter*, 48 La. Ann. 197, 19 South. 265. When one forms the purpose to kill another and fires at him, the fact that the ball misses the intended victim and kills a third person does not relieve the murderer: *Commonwealth v. Breyessee*, 160 Pa. St. 451, 40 Am. St. Rep. 729, 28 Atl. 824. If, by mistake or misadventure, while attempting, with deliberate and premeditated malice, to kill one person, the slayer kills another, he is guilty of murder in the first degree: *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20. To the same effect, see *State v. Raymond*, 11 Nev. 98. Compare *Bratton v. State*, 10 Humph. (Tenn.) 103; note to *Whiteford v. Commonwealth*, 18 Am. Dec. 786. And where one is killed in the mistaken idea that he is another, and the killing of such other would have been murder, the crime is not reduced by the mistake to a grade below murder: *Brown v. State*, 147 Ind. 28, 46 N. E. 34; or murder in the first degree: *Commonwealth v. Eisenhower*, 181 Pa. St. 470, 59 Am. St. Rep. 670, 37 Atl. 521. Accidentally killing one who intercedes to prevent the offender from unlawfully shooting at another is murder: *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17, 7 South. 193. So shooting at one with an

alleged design of doing him injury only, and killing a third person, is murder: *State v. Smith*, 2 Strob. (S. C.) 77, 47 Am. Dec. 589. And shooting at an officer in resisting an arrest while in the line of his duty, and accidentally killing a third person, is murder: *Angell v. State*, 36 Tex. 542, 14 Am. Rep. 380.

5. **Shooting into a Crowd or House.**—A homicide committed by intentionally and recklessly shooting into a private residence where the deceased and her two children are is murder: *Russell v. State*, 38 Tex. Cr. App. 590, 44 S. W. 159. See, also, *Washington v. State*, 60 Ala. 10, 31 Am. Rep. 28. And a homicide accidentally committed in brandishing a revolver in a room where there are others amounts to manslaughter: *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92. If a person, without lawful excuse, intentionally fires a pistol in a crowded room, not with the design of killing any one, but for diversion, and kills one of the crowd, he is guilty of murder; for his conduct establishes "general malignity and recklessness of the lives and personal safety of others, which proceed from a heart void of just sense of social duty, and fatally bent on mischief": *Brown v. Commonwealth*, 13 Ky. Law. Rep. 372, 17 S. W. 220.

If a person maliciously and without provocation fires a gun into a crowd regardless of the consequences, and kills a bystander, he is guilty of murder; and it is for the jury to say, from the facts and circumstances, whether such killing was willful, deliberate, and premeditated. It is immaterial that he fires at no particular person. He recklessly fires, not caring who may suffer from it. "A more wicked and malicious act could hardly be conceived. The fact that an innocent man is the victim of his unlawful conduct makes the act the more reprehensible, for it is entirely beyond the bounds of palliation or excuse: *Bailey v. State* (Ala.), 32 South. 57; *Austin v. State*, 110 Ga. 748, 78 Am. St. Rep. 134, 36 S. E. 52; *Golliher v. Commonwealth*, 2 Duvall (Ky.), 163, 87 Am. Dec. 493; *State v. Young*, 50 W. Va. 96, 88 Am. St. Rep. 846, 40 S. E. 334.

BALTIMORE AND OHIO SOUTHWESTERN RAILWAY COMPANY v. COX.

[66 Ohio St. 276, 64 N. E. 119.]

ACTIONABLE NEGLIGENCE Exists Only When one negligently injures another to whom he owes the duty of exercising care. (p. 584.)

RAILROAD—Duty to Person on Freight Train.—There can be no recovery for the negligent death of a person riding on a freight train with the assent of the conductor, but against the rules of the railroad company. (pp. 585, 586.)

Action by Mrs. Cox, as administratrix, to recover from the railway company for the death of John H. Cox. She alleged that, on the day of his death he was employed by the company as fireman, and was riding by its order on a freight train; that at a certain station the train was stopped at a siding to allow a passenger train coming from the opposite direction to pass; that he then went forward to talk to the engineer about his employment, and climbed upon the locomotive at the engineer's request; and that while there the passenger train collided with the engine and killed him. In its answer the company admitted the allegations of the complaint as to the collision and death, but denied all the others, and alleged that Cox was on the train without the knowledge or permission of the company, without any business connected with it, and without right.

The evidence tended to show the following facts: The accident was due to the negligence of a brakeman in leaving the switch open. Cox had occasionally been employed by the company for several years, but had not been in its service since the month preceding his death. In the meantime he had been visiting friends at Mineral City, and on the day of the accident boarded the train, whose conductor was his friend, to ride to another place to look for further employment with the company. And this was the purpose of his interview with the engineer. He had no pass, neither did he pay fare, nor intend to. The rules of the company showed that freight trains, unless running as accommodation trains, were not permitted to carry passengers except on special order, and they forbade engineers to permit any but employes to ride on their locomotives. The train was not run as an accommodation train, nor was there a special order. At the close of the plaintiff's evidence the judge directed a verdict for the company. In the circuit court a judgment rendered in the common pleas upon this verdict was reversed, and the cause remanded for a new trial.

Robert E. Hamill, Edward Barton, and Willis H. Wiggins, for the plaintiff in error.

John C. Entrekin and John T. Phillips, for the defendant in error.

287 SHAUCK, J. It is elementary that actionable negligence exists only when one negligently injures ²⁸⁸ another to whom he owes the duty, created by contract or operation of law, of exercising care: *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Pittsburgh etc. R. R. v. Bingham*, 29 Ohio

St. 364, 23 Am. Rep. 751; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274. There being in the present case neither allegation nor evidence that the fatal injuries were inflicted willfully or intentionally, there can be no recovery unless there existed between the decedent and the company a relation which imposed upon it the duty of exercising care toward him. Although it was alleged in the petition that he was at the time of the accident in the service of the company and traveling on a freight train in obedience to its orders, the allegation was denied in the answer and refuted by the testimony of the plaintiff herself.

The view of counsel for the defendant in error appears to be that the duty of the company to exercise care toward the decedent arose out of the fact that he was riding on the freight train with the express or implied assent of the conductor; and this view is said to have been taken in the circuit court. It invokes the doctrine of the law of agency; and since the company did not authorize the transportation of passengers on its freight trains, it relies upon the implied or apparent authority of the conductor to bind the company to a relation which its rules forbade. It assumes that the company had given to the conductor an apparent authority which its operating rules had expressly denied him. But the apparent authority of the conductor was to represent the company in the conduct of that portion of its business to which the train in his charge was appropriate. It did not, therefore, exceed his actual authority. The differences between trains intended exclusively for the carriage of freight and those intended for the carriage ²⁸⁹ of passengers are so obvious and familiar as to forbid the view suggested. The cases in which a recovery has been denied upon such facts as are here presented are so numerous that it is not practicable to cite them fully. Among them are *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513; *McVeety v. St. Paul etc. Ry. Co.*, 45 Minn. 268, 22 Am. St. Rep. 728, 47 N. W. 809; *Virginia etc. Co. v. Roach*, 83 Va. 375, 5 S. E. 175; *Files v. Boston etc. R. R. Co.*, 149 Mass. 204, 14 Am. St. Rep. 411, 21 N. E. 311; *Smith v. Louisville etc. R. R. Co.*, 124 Ind. 394, 24 N. E. 753; *Railroad Co. v. White* (Tex. Civ. App.), 34 S. W. 1042; *Louisville etc. Ry. Co. v. Hailey*, 94 Tenn. 383, 29 S. W. 367; *Texas etc. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

The adjectives used to characterize the negligence of the brakeman in leaving the switch open should not be permitted to excuse the obvious failure of the plaintiff below to place

her intestate in the position of one to whom the company owed care. In directing a verdict for the defendant the trial judge correctly applied to the evidence the pertinent principles of the law as they are illustrated in the decided cases.

Judgment of the circuit court reversed and that of the common pleas affirmed.

Burket, Davis and Price, JJ., concur.

Persons on Trains not operated for carrying passengers, by invitation, are entitled to at least ordinary care from the railway company: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162, 5 Am. St. Rep. 510, 14 N. E. 197; *Mathews v. Great Northern Ry. Co.*, 81 Minn. 363, 83 Am. St. Rep. 383, 84 N. W. 101. See, also, *Enright v. Pittsburg etc. R. R. Co.*, 198 Pa. St. 166, 83 Am. St. Rep. 795, 47 Atl. 938; *Bolin v. Chicago etc. Ry. Co.*, 108 Wis. 333, 81 Am. St. Rep. 911, 84 N. W. 446; *Earl v. Chicago etc. Ry. Co.*, 109 Iowa, 14, 77 Am. St. Rep. 516, 79 N. W. 381; *Steele v. Southern Ry. Co.*, 55 S. C. 389, 74 Am. St. Rep. 756, 33 S. E. 509; *McVeety v. St. Paul etc. Ry. Co.*, 45 Minn. 268, 22 Am. St. Rep. 728, 47 N. W. 809. It has been held, however, that a railroad company is not answerable to a trespasser on a train for negligence, and owes him no duty other than doing him no willful or wanton injury: *Richmond etc. R. R. Co. v. Burnsed*, 70 Miss. 437, 35 Am. St. Rep. 656, 12 South. 958.

Negligence.—Where no Duty is owed, there cannot be negligence: *Welch v. Walsh*, 177 Mass. 555, 83 Am. St. Rep. 302, 59 N. E. 440.

FARMERS' BANK v. DIEBOLD SAFE AND LOCK CO.

[66 Ohio St. 367, 64 N. E. 518.]

PLEDGE OF STOCK.—If the Secretary of a Corporation finds and abstracts from the custody of the company, a mislaid and supposedly canceled or surrendered certificate of stock, which was issued to him, but afterward transferred to the company as collateral, and pledges it for a personal indebtedness, the innocent pledgee takes no title. (pp. 588, 591.)

This controversy concerned a certificate of stock No. 61. It was issued by the Diebold Safe and Lock Company to Dominick Tyler, its secretary and treasurer. As security for his indebtedness to the company, he transferred the certificate to it with this indorsement on the back: "For value received . . . do hereby sell and assign this certificate to . . . and authorize the stock represented therein to be transferred on the books of the company. D. Tyler." The certificate was then handed to W. W. Clark, the president of the corporation, who placed it in an unlocked drawer of the safe of the company. The safe was in

the office occupied by Clark and Tyler, and was used by them to keep the corporate papers. Both had access to it. At this time there was marked on the stub of the certificate on the stock-book this expression: "8-20-'84. Left with the company as collateral security." Tyler did not pay the indebtedness. Clark agreed to buy the certificate from him, but it could not be found when looked for. Whereupon a certificate, No. 140, was issued to Tyler, and by him assigned to Clark. From the money received, Tyler discharged the indebtedness. Afterward Clark surrendered certificate No. 140, and had another issued directly to him. When certificate No. 140 was issued, there was marked on the stub of the stock-book from which certificate No. 61 had been issued the words: "Certificate lost and duplicate issued under No. 140." But number 61 had nothing on it indicating it had been surrendered or canceled, though it was so considered by the corporation. It was the custom of the corporation, when a certificate was canceled or surrendered, to attach it to the stub of the stock certificate-book from which it had been taken. Subsequently, Tyler found certificate No. 61 in the safe, and without the knowledge of Clark or the company, pledged it to the Farmers' Bank as security for a personal loan to himself. The bank had no knowledge of how he obtained the certificate. He afterward pledged the certificate, under like circumstances, to McDowell, one of the plaintiffs in error. The circuit court found that the certificate was mislaid without fault or negligence, and that Clark became, by the purchase of the stock, and afterward continued to be, the actual owner thereof.

McCarty, Craine & McDowell and A. A. Thayer, for the plaintiffs in error.

Clark, Ambler & Clark, for the defendants in error.

372 SPEAR, J. The demand of the plaintiffs in error is, in substance, that the company and Clark be held not to have title in certificate No. 61, and that title **373** in the same be declared to be in them, and for full equitable relief.

It is manifest that if this relief be granted, the claims of the company and of Clark must be denied them on the ground either: 1. On the doctrine of implied agency; or, 2. On the application of the principles of estoppel. But Tyler, although secretary and treasurer of the company, was not its agent to represent to one with whom he might be deal-

ing on his own account and away from its office the fact as to who owned the stock of the corporation, or in whose name the stock stood on its books. Such representations were no part of his real or apparent authority. The transaction with the bank was one which did not concern his official duty in any respect, but was wholly for his own personal profit. The company had no actual or apparent connection with it, nor did Tyler pretend to represent or act for the company. Indeed, it was apparent from the face of the certificate that Tyler had exercised his authority as secretary for his own advantage. In other words, the case stands as to the question of agency precisely as though the transfer had been made by one who had no relation whatever with the management of the company, for it is of no materiality that Tyler was the agent of the company for some purposes so long as he was not its agent for the purpose of negotiating its certificates of stock as security for his individual debts, and so long as he did not pretend to have such authority, nor to act for the company in any way.

True, the statute gives authority to the president and secretary, on demand, to execute and deliver to a stockholder a certificate showing the amount of stock owned by him, but it does not follow from this ³⁷⁴ provision that the secretary could have authority, express or implied, to take possession of a certificate once owned by him, but which had been legally and formally transferred and manually delivered to the company, and thus passed wholly out of his own possession, and later sold outright to a third party, and issue it anew. His act in abstracting the certificate from the safe and uttering it as valid had no relation to the authority with which he was actually clothed, nor in fact with any semblance of authority. It was, in fact, a criminal act, perpetrated for private gain and not connected with any official authority, real or apparent. At all times after the transfer to the company the certificate was in legal as well as manual possession of the company until the purchase by Clark, and then and thereafter it was in his legal possession, and in his actual possession until abstracted by Tyler. Tyler's access to the drawer where the certificate had been placed by Clark, and opportunity to possess himself of any of its contents was not, therefore by reason of any authority. His opportunity was that of a mere servant. The doctrine of implied agency would not seem to be applicable to the facts of this case.

Is the company, or is Clark, estopped to make defense and set up title to the stock? The ground urged by the plaintiff in error is that of culpable negligence. The finding of the trial court that certificate No. 61 was lost or mislaid without any fault or negligence on the part of Clark or of the company answers this claim of estoppel unless the law is that one may not leave his property where it may be found by a servant except at the peril of losing his title thereto if the servant steals and disposes of it to another. We know of no principle of law nor of ³⁷⁵ any decision which goes to this length. The facts do not make a case where the owner of property has put it in the possession of another with indicia of ownership so as to invoke the rule that where two innocent persons must suffer by the act of a third, he who has enabled the former to occasion the loss must sustain it. The company, when it became the equitable owner of the stock, placed the certificate in the drawer of its president; it did not place it in the possession, real or constructive, of Tyler. Nor was there any reason existing for suspecting the integrity of Tyler. He had been an officer of the company, trusted, and apparently deserving trust, since the year 1876. Nothing had occurred during all this time to cause the company or his fellow-officers to doubt his honesty and faithfulness, and so far as appears, the abstracting and using this surrendered certificate was his first act of malversation during his employment. If the company had had reason to suspect the honesty of Tyler, a different question would be presented. It is not negligence, but ordinary care and prudence, to deal with one who has proven himself worthy of confidence in the belief that he remains honest, and trust him accordingly, even though it should turn out that he afterward, yielding to temptation, has betrayed his trust. As remarked by Williams, J., in *Ex parte Swan*, 7 Com. B., N. S., 447: "It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might foresee and dread, and therefore shun. But it is another and very different proposition to maintain that a man shall forfeit his property because he has done an act which will not be perilous unless others are guilty of misconduct which that act does not cause." The injury to the bank and to McDowell ³⁷⁶ was not the natural consequence of the leaving of the certificate in the president's drawer, or one which might have been reasonably anticipated. The rule, and we believe the true rule, is stated by Blackburn, J., in *Swan v. N. B. Australasian*

Co., 2 Hurl & C. 182, thus: "The neglect must be in the transaction itself, and be the proximate cause of leading the party into the mistake; and also, as I think, that it must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom the person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy."

It is urged that the company ought, before issuing a new certificate to Clark, to have required a bond of indemnity from Tyler. But No. 61 was not a lost or destroyed certificate within the meaning of the statute; nor was it outstanding. It was in the possession and custody of the company; for the time mislaid, but still in its control. Tyler had already done respecting it all that he was to do, or could then have been required to do.

It is further insisted that, on the authority of *National Bank v. Lake Shore etc. Ry. Co.*, 21 Ohio St. 221, Clark having but an equitable title to the stock, cannot prevail against the bank's legal title. But this proposition assumes the very point in controversy, and the trouble with it is that the bank got no title. It took its pledge from one who did not own the property; in other words, from a thief.

A review of the authorities we regard as unnecessary and content ourselves with the citation of the following cases: *Moore v. Bank*, 111 U. S. 156, 4 Sup. Ct. Rep. 315; *Farrington* ³⁷⁷ *v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 199; *Manhattan Life Ins. Co. v. Forty-second St. etc. R. R. Co.*, 139 N. Y. 146, 34 N. E. 776; *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 26 Am. St. Rep. 230, 28 N. E. 142; *Knox v. Eden Musee Co.*, 148 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. 988; 1 Cook on Corporations, sec. 359; *Barstow v. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Birmingham Land Co. v. Dennis*, 85 Ala. 565, 7 Am. St. Rep. 73, 5 South. 317; *Swim v. Wilson*, 90 Cal. 126, 25 Am. St. Rep. 110, 27 Pac. 33; *O'Herron v. Gray*, 168 Mass. 573, 60 Am. St. Rep. 411, 47 N. E. 429; *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115.

Much stress is laid by counsel for plaintiffs in error upon the case of *Cincinnati etc. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 47 N. E. 249, and it is insisted that the case at bar is ruled in their favor by that case. We think not. That was a case of overissue by an officer having apparent authority

to issue. This is a case of a stolen certificate. The substance of the holding in the case cited is, as expressed in the third paragraph of the syllabus, that the company is charged with the duty of observing care in the issue of stock, and of supervising their agents charged with the performance of the duty, and the want of care found against the corporation was that it negligently permitted its secretary to have possession of certificates of stock, signed by its president and having thereon the corporate seal, in excess of its authorized capital, and thus afforded that officer the opportunity of fraudulently issuing certificates of stock. It is apparent that this case presents a radical distinction when placed in contrast with the case at bar. There the negligence of the company was an essential feature; here it is distinctly found that the company was not negligent. Whether the language of the opinion and syllabus, in all particulars, is or not of too broad a character we need not discuss. Suffice to say that the law of the case is the judgment of the court upon the facts found, and that, and that alone, is what is binding as a precedent. ³⁷⁸ The essential facts being different, the case does not apply.

The case at bar may be summed up in a paragraph. The secretary of the corporation was a holder of its stock represented by a valid certificate. He pledged the stock to the company as security for a debt owing to it, and assigned the certificate in blank and delivered it so assigned to the company. It was then placed by the president in his drawer in the company's safe. Later the secretary, by private agreement with the president, sold the certificate to him outright. Without fault of the company or of the president the certificate had become mislaid. Some time after the secretary found and fraudulently abstracted the certificate from the drawer and pledged it for a private debt to an innocent taker, who accepted the security without inquiry. This pledgee took no title.

The judgment of the circuit court will be affirmed.

Williams, C. J., Burket, Davis, Shauck, and Price, JJ., concur.

Pledge of Stock and Corporate Securities.—One who receives from an officer of a corporation its notes or securities as security for the payment of the officer's personal debt does so at his own peril: *Wilson v. Metropolitan etc. Ry. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; *Wheeler v. Home Sav. etc. Bank*, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598. And if stock of a corporation is fraudulently issued by one of its officers as security for his private debt, the corporation is not estopped as against the officer's creditor to deny the validity of the stock: *Farrington v. South Boston R. R. Co.*, 150 Mass. 406, 15 Am. St. Rep. 222, 23 N. E. 109.

STATE v. JONES.

[66 Ohio St. 453, 64 N. E. 424.]

OFFICE—Right to, Under Unconstitutional Statute.—Persons claiming to be the successors of the defendants in office are without authority to make the relation in mandamus to compel its delivery to them, unless the act under which they were appointed is valid. (pp. 593, 594.)

CONSTITUTIONAL LAW—Classification of Cities.—Legislation evincing an intention that municipalities having substantially the same conditions and characteristics shall not enter and remain in the same class, is ineffectual to designate classified recipients of corporate power, and an act to confer such power upon a single city, by such classification, is unconstitutional. (pp. 594, 599.)

MUNICIPAL CORPORATION—Corporate Powers—What Are. A statute providing for the organization and support of a police force of a city, the expenses thereof to be paid by a tax upon the property within the city, confers corporate powers. (pp. 598, 599.)

This was a petition for a writ of mandamus commanding the defendants to deliver the property of the police department of the city of Toledo to the relators. Under a statute of April 27, 1902, they had been appointed by the governor as police commissioners of the city; and the defendants constituted the board of police commissioners prior to and on the date of the passage of such act, holding their office under sections 1984 and 1985 of the Revised Statutes, which were repealed by the terms of the above act of April 27, 1902. This act amends section 1984 so as to provide as follows: "All police powers and duties connected with and incident to the appointment, regulation and government of a police force in cities of the third grade of the first class, shall be vested in and exercised by a board of police commissioners, to be appointed by the governor. The governor shall appoint, as such commissioners, four citizens, electors of such cities, respectively, well known for their intelligence and integrity, not more than two of whom shall be of the same political party; two of whom of different political party faith and allegiance, shall be designated in their appointment to serve for two years, and the other two, also of different political party faith, shall be designated to serve for four years. And thereafter, at the expiration of such term, and at each period of two years, the governor shall appoint two members of said board to serve for a period of four years.

"For official misconduct, the governor may remove any of said commissioners; and all vacancies in said board by death, resignation or removal, shall be filled by the governor for the un-

expired term; and all vacancies from whatever cause shall be so filled that not more than two of the members of said board shall be of the same political party, or so reputed. The commissioners, before entering upon their duties, shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Ohio; to obey the laws, and in all their acts and official actions and judgments, to aim only to secure and maintain an honest and efficient system of police, free from partisan dictation and control."

The cause was submitted on demurrer to the petition.

J. M. Sheets, attorney general, and Doyle & Lewis, for the relators.

Brown, Geddes & Bodman, Clarence Brown, and Brand Whitlock, for the defendants.

482 SHAUCK, J. In the opinion of counsel for the relators the constitutional validity of the act of April 27, 1902, is not involved in the present inquiry. Their view of the subject is that this act repeals the statutory authority under which the defendants held the office of police commissioners, and that the relators are therefore the only persons who, under an existing statute, claim to hold the office, and to be entitled to the possession and custody of the property which appertains to it. For two conclusive and independent reasons we regard this view as defective, and the conclusion to which it leads as unsound.

This act, and the sections for whose repeal it provides, relate to the police organization of the city of Toledo. Such organization is not otherwise provided for. Owing to the relation and the subject matter of the statutes, we cannot suppose that the general assembly would have enacted the section repealing the law under which the defendants claim and hold office, but for the belief that the act under which the relators were to succeed them would be operative. That supposition would impute to the general assembly an intention to leave the city without such organization. That is forbidden by the nature of the subject, and by the universally recognized necessity for such an organization in all the cities of the state. Applying to the case a doctrine with which the lawyers **483** of the state are quite familiar, the repealing section of the present act is inoperative unless its provisions for reorganization of the board are valid. The system provided by the former legislation being still in full opera-

tion, it should continue, unless, by a valid act, a system to succeed it has been provided.

It also seems quite clear that the title of the relators and their right to the possession of the property appertaining to the office of police commissioners depends upon the constitutional validity of the act of April 27, 1902. If that act is invalid, the relators are but private citizens, wholly without authority to demand or receive such property, and without authority to make the present relation. Even if the defendants have ceased to hold office as police commissioners, there is no duty enjoined upon them by law to deliver the property in question to persons who are without official rights and duties with respect to it.

The validity of the act is denied because, in the view of counsel for the defendants, it is a special act conferring corporate powers, in violation of the first section of the thirteenth article of the constitution, ordaining that: "The general assembly shall pass no special act conferring corporate powers." Confessedly, if the act is general, it is not within the inhibition of this section. The act is said to be general and not special, because it provides for "the appointment, regulation, and government of a police force in cities of the third grade of the first class." That it affects no municipality in the state except Toledo is admitted. But the fact is said to be immaterial, because of the classification of cities by the general assembly, and the doctrine formerly applied by the courts to such classification.

⁴⁸⁴ That there has long been classification of the municipalities of the state is true. It is also true that while most of the acts conferring corporate powers upon separate municipalities by a classified description, instead of by name, have been passed without contest as to their validity, such classification was reluctantly held by this court to be permissible. But attention to the original classification, and to the doctrine upon which it was sustained, must lead to the conclusion that the doctrine does not sustain the classification involved in the present case, and in *State v. Beacon*, 66 Ohio St. 491, post, p. 599, 64 N. E. 427. Originally, all the municipal corporations of the state were comprehended within the following classification: "Cities of the first and cities of the second class, incorporated villages, and incorporated villages for special purposes." The basis of the classification was unqualifiedly fixed by the statute which provided that all cities which then had, or might thereafter have, a population exceeding twenty thousand, should be cities of the first class; and, by like terms, municipali-

ties having, or attaining to, a population of more than five thousand, but not exceeding twenty thousand, should be cities of the second class. By an unvarying rule the characteristic of population was made the basis of the classification, and it was made inevitable that every city attaining a population of twenty thousand should advance, and become a city of the first class; and that every village attaining a population of five thousand should become a city of the second class. Against the validity of acts conferring corporate powers by such classification, it was urged that the validity of an act must be determined by its practical operation, and not by its form; and that such acts, though general ⁴⁸⁵ in form, were special in operation. The answer to that objection stated the sum of the judicial doctrine of classification. One may state that answer as strongly as his abilities will permit, without giving it his approval. The answer was that the classification was to be permanent since it was to be presumed that the general assembly intended obedience to the constitution, that the requirement of the constitution was not that an act granting corporate power should immediately operate in all cities, but that there was a sufficient compliance in the provisions of the statute for the imperative advancement of every municipality when it should have the prescribed characteristic of population, and thus every municipality of the class described in the statute by which power was conferred, or of a lower class, might come within its operation. Two things were true, and they were of the essence of the doctrine. Advancement was by a rule of unvarying application, and every municipality might become subject to the operation of every statute conferring corporate power upon its own or a higher class.

The number of classes into which successive acts have since divided the municipalities of the state to make them recipients of corporate power cannot be ascertained upon any inquiry that is practicable. Sections 1546 to 1552 of the Revised Statutes relate exclusively to the subject of classification. The first of these sections now provides that cities of the first class shall be of three grades, and cities of the second class shall be of eight grades. In the present view, grades of classes are but added classes. In these eleven classes the eleven principal cities of the state are isolated, so that an act conferring corporate power upon one of them by classified description confers ⁴⁸⁶ it upon no other. They have been isolated under the guise of classification, as their growth promised realization of the belief which

was the foundation of the judicial doctrine of classification, viz., that their advancement under the unvarying rule of population would give a wider operation to acts conferring corporate powers. An impediment to the more general operation of laws conferring corporate powers on cities of the first class is found in section 1546: "Cities of the second class, which hereafter become cities of the first class, shall constitute the fourth grade of the latter class." We are not aware that there is now in the state a city of the fourth grade of the first class, but the class is provided to the end that it may receive any city of the second class which may be advanced, and that such city may thus be excepted from the operation of these acts relating to Cleveland and Toledo, which are, respectively, cities of the second and third grade of the first class. The judicial doctrine of classification was, that all the cities having the same characteristic of a substantial equality of population should have the same corporate power, although another class might be formed upon a substantial difference in population. The classification now provided affords no reason for the belief that it is based upon such substantial difference in population as the judicial doctrine contemplated. When the original classification, and the numerous reclassifications were made, Cincinnati was the most populous city in the state. Cleveland now exceeds it in population, but corporate powers continue to be conferred by the former description. Is it believed that a doctrine which recognized the validity of legislation applying only to the city of Cleveland because it was substantially below Cincinnati in population ⁴⁸⁷ requires us to hold that similar legislation is now valid because it has the larger population? Furthermore, the increasingly numerous classes of municipalities show that even when a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. We have been required, from time to time, to examine many of the acts to confer corporate powers upon the isolated cities composing the eleven classes referred to, and others containing special classifications, and still others have been examined in the present inquiry. In view of the trivial differences in population, and of the nature of the powers conferred, it appears from such examination, that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for

the different municipalities of the state. An intention to do that which would be violative of the organic law should not be imputed upon mere suspicion. But the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded by this section of the constitution. The provisions of the section could not be more clear or imperative, and relief from the present confusion of municipal acts and the burdens which they impose would not be afforded by its amendment. Since we cannot admit that legislative power is in its nature illimitable, we must conclude that this provision of the paramount law annuls ⁴⁸⁸ the acts relating to Cleveland and Toledo, if they confer corporate power.

Counsel for the relators, in support of the act relating to Toledo, urge the conclusion that even though the act should be regarded as special, it is not repugnant to this section of the constitution because, in their view, it does not confer corporate powers. The observations relating to this subject in *City of Cincinnati v. Trustees of Cincinnati Hospital*, 66 Ohio St. 440, 64 N. E. 420, are pertinent, but they need not be repeated here. It is no longer doubted that the corporate powers contemplated by this section are those conferred upon municipalities, as well as those conferred upon private or commercial corporations. Though it might be difficult to give a conceptual definition of corporate powers which would be found complete and accurate in all cases, an accurate descriptive definition readily occurs, and it is sufficient for present purposes. They are such powers as are usually conferred upon corporations. In the present aspect of the subject they are such powers as are usually conferred upon municipal corporations. They are classified by Judge Dillon as follows: "If we analyze the complex powers usually conferred upon a municipality in this country we shall discover that these are of two general classes, viz.: 1. Those which relate to health, good government, efficient police, etc., in which all the inhabitants have an equal interest and ought to have an equal voice; 2. Those which directly involve the expenditure of money, and especially those relating to local improvements the expense of which ultimately falls upon the property owners."

Surely we shall not err if we regard the phrase "corporate powers" as embracing all the powers which, within the observation of those who framed ⁴⁸⁹ and adopted the constitution, were conferred upon and exercised by all the cities of the state.

Of these powers perhaps none is more conspicuously exercised than that of maintaining the public order and enforcing municipal ordinances.

It is also quite obvious that this act contemplates a large increase in the expense of maintaining the police department of Toledo, and that expense must be paid with money raised by the exercise of the municipal power of taxation. That is a corporate power: *Cincinnati v. Trustees of Cincinnati Hospital*, 66 Ohio St. 440, 64 N. E. 420. In this connection it is interesting to observe the relation of this section of the constitution to section 26 of article 2, which provides that "all laws of a general nature shall have uniform operation throughout the state." It is within the knowledge common to all whose attention has been directed to the subject that one of the most prominent of the purposes leading to the adoption of the present constitution was to relieve the people of the evils of special legislation, legislation which was enacted by the votes of representatives who were indifferent to the subject, because the legislation did not affect their constituencies. This is clearly shown by the debates in the constitutional convention, by the public history of those times, and by repeated judicial expositions of the subject. Conclusive evidence of the evil is preserved in the volumes which contain the acts of the legislature at its sessions held shortly before the adoption of the present constitution. That these important changes have been made in the organic law would not be suggested by a comparison of the bulk and contents of those volumes with the bulk and contents of those which are again appearing. These sections were admirably adapted to accomplish the purpose in view, for in their combined scope they ⁴⁹⁰ seemed to comprehend the entire field in which special legislation had been enacted. Every consideration suggested for regarding the act under consideration as being without the first section of article 13 tends to the conclusion that it is within the twenty-sixth section of article 2. The reliance for the realization of the benefits contemplated by those provisions of the constitution was: 1. Upon the dutiful obedience of the general assembly to their requirement; and 2. Upon the well-established duty of the courts to adjudge all legislation in violation of constitutional limitations to be void. There is no other relief.

Counsel for the defendants further insist that the act is violative of the principles of local self-government, recognized in *State v. Hamilton County Commrs.*, 54 Ohio St. 333, 43 N. E. 587, particularly stated in the opinion of Minshall, J., in that

case, and Cooley's Constitutional Limitations, 47, *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and of the sixth section of the thirteenth article of the constitution. These questions are passed without consideration, the propositions believed to have been already established being sufficient to determine the case.

Demurrer sustained, and petition dismissed.

Burket, Spear, Davis, and Price, JJ., concur.

Constitutional Law.—Classification on the basis of population in a statute relating to the machinery and powers of municipalities is legitimate, if such population bears a reasonable relation to the necessities of the municipalities. Classification in such cases is necessarily committed to the judgment of the legislature, and its judgment must prevail unless the classification is plainly illusory or applied illusively: *Wanser v. Hoos*, 60 N. J. L. 482, 64 Am. St. Rep. 600, 38 Atl. 449; *Commonwealth v. Moir*, 199 Pa. St. 334, 85 Am. St. Rep. 801, 49 Atl. 351; monographic note to *State v. Ellet*, 21 Am. St. Rep. 184. The fact that a statute is applicable to the conditions existing in a single city does not necessarily render it special legislation: Note to *State v. Sheriff*, 31 Am. St. Rep. 653. Compare *State v. Des Moines*, 96 Iowa, 521, 59 Am. St. Rep. 381, 65 N. W. 818; *Knoff v. People*, 185 Ill. 20, 76 Am. St. Rep. 17, 57 N. E. 22.

The Principal Case is followed in the subsequent case of *State v. Beacom*, 66 Ohio St. 491, post, p. 599, 64 N. E. 427.

STATE v. BEACOM.

[66 Ohio St. 491, 64 N. E. 599.]

CONSTITUTIONAL LAW.—A Statute Conferring Corporate Powers Upon a Single City, under a classification ineffectual for that purpose, is unconstitutional, and persons holding office thereunder may be ousted on quo warranto. (pp. 600, 601.)

Quo warranto. The defendants are acting as the director of law, director of public works, director of police, director of fire service, director of accounts, and director of charities and corrections, respectively, of the city of Cleveland. Together they claim the board of control of the city, with authority to control all the property of the city, including the power of taxation. The petition alleges that the authority claimed is not vested in them by any valid law. In their answer the defendants admit their claim to authority, but allege that it is lawfully conferred by an act of March 16, 1891, entitled "An act to provide a more efficient government for cities of the second grade of the first

class," and several acts amendatory thereof. The case is submitted on demurrer to the answer. The questions involved grow out of the operation of the statute which, by its terms, is limited to "cities of the second grade of the first class," it being admitted that the act confers corporate powers, and that Cleveland is the only city on which the act operates.

John M. Sheets, attorney general, C. D. Gibbons, and Gouldner, Halding & Masten, for the plaintiff.

M. W. Beacom and Baker, Payer, Gage & Carey, for the defendants.

506 SHAUCK, J. The admission that the act confers corporate powers, and that it in fact confers them on the city of Cleveland alone, would be equivalent to an admission that it is repugnant to section 1 of article 13 of the constitution, but for the contention based upon the classification which is employed in defining the operation of the act. Our reasons for the conclusion that the classification is ineffectual for the purpose for which it is invoked are sufficiently stated in the preceding case of *State v. Jones*, 66 Ohio St. 453, ante, p. 592, 64 N. E. 424. Perhaps a careful consideration of the eighty-six sections of the present act would afford additional reasons for that conclusion, but those stated in the case cited are deemed sufficient; and except as they are passed on in that case, objections urged against the validity of the present act are not considered.

Although the two acts are adjudged to be void for the same reasons, some attention seems to be due to the effect of judgments appropriate to the conclusion that both acts are ineffectual to confer the powers claimed. In that case the relators sought to be admitted to office under favor of the act which was adjudged **507** to be void. The judgment denied their claim, leaving the defendants in office to continue in the discharge of its duties. In the present case the same conclusion with respect to the invalidity of legislation of the same character points inevitably to a judgment of ouster, leaving no one to exercise the functions of the offices, some of which seem to be indispensable to the orderly conduct of the affairs of the city of Cleveland.

On the hearing of the present case some members of the court, including myself, were inclined to the view that as this legislation had been permitted to become inoperative, and to affect in important respects the de facto government of the city, the inquiry should be regarded as too late, but that inclination is com-

pletely checked by attention to the considerations involved. The attorney general has invoked a jurisdiction which we undoubtedly possess; and this he has done in the discharge of his duty and in a manner conformable to established practice. It is admitted that no limitation bars inquiry into the title of the defendants. In this posture of the case we can neither refuse to act, nor act otherwise than in accordance with our views of the requirements of the constitution.

"Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will, and the constitution has appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without anyone being sufficiently interested ⁵⁰⁸ in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the constitution": Cooley's Constitutional Limitations, 85, 86.

But this is a public action, instituted and conducted solely for the protection of the public against injuries to result from infractions of the constitution, and while a judgment of ouster must follow our conclusions, we think public considerations will justify such suspension of its execution as will give to those discharging the duties of the other departments of the government of the state an opportunity to take such action as to them may seem best, in view of the condition which the execution of our judgment will create; and this suspension will be until the 2d of October, 1902.

Demurrer to the answer sustained; judgment of ouster; execution of judgment suspended until October 2, 1902.

Burket, Spear, Davis, and Price, JJ., concur.

The Principal Case affirms the doctrine laid down in *State v. Jones*, 66 Ohio St. 453, ante, p. 592, 64 N. E. 424.

CLEVELAND, AKRON AND COLUMBUS RAILWAY
COMPANY v. WORKMAN.

[66 Ohio St. 509, 64 N. E. 582.]

RAILROADS—Licensee on Track.—A Railroad Employé, whose duties do not require him to go upon the track in a hand-car, but who does so as a matter of convenience, and without objection from the company, is, at most, a mere licensee, to whom the company owes no duty of especial protection in running trains, except to use reasonable care after discovering him. (pp. 604, 607.)

RAILROADS—Signals of Train.—The Statutory Duty of a railroad to give signals when a train approaches a crossing does not inure to the benefit of persons who are on the track, and not at a crossing. (pp. 605, 607.)

RAILROADS—Contributory Negligence.—If a Railway Employé, for no other reason than his own convenience, goes upon the main track with a hand-car, against the orders of a superior, and without looking behind him, when he could reach his destination on a sidetrack, no recovery can be had for his death from a passing train, unless the defendant could have avoided the accident after discovering him. (p. 607.)

WRONGFUL DEATH—Elements of Damage.—In an action against a railway company, for the wrongful death of an employé, no recovery can be had for pecuniary loss by the father, who is also an employé of the defendant, if his negligence contributed to the accident. (pp. 607, 608.)

EVIDENCE—Proof of Ordinance.—It is error to permit parol proof of the passage of an ordinance. (p. 608.)

EVIDENCE—Book of Rules of Railroad.—It is error to send to a jury a book of rules of a railroad company, to be used in their deliberations when only a few of the rules have been offered in evidence. (p. 609.)

This was an action by the defendant in error as administrator of Arleigh L. Mead for the death of his intestate through the alleged negligence of the plaintiff in error. It appeared that the father of the decedent was a station agent for the railway company at Buckeye City, a part of whose duties it was to light the switch lamps. To assist him in this, he purchased, without objection on the company's part, a hand-car or "speeder." The decedent was about sixteen years of age, and was in the employ of the company as his father's assistant. His duty, among others, was to light the switch lamps and bring them in. His father permitted him to use the speeder in doing his work, but had cautioned him to look out for trains and forbidden him to allow others on it with him.

At times extra trains ran through the city. A rule of the company provided that they might run at any time without previous notice. On the day of the accident a telegraph operator,

temporarily assisting the father, heard orders going over the wires that an extra was on the road, and informed the father thereof. He was busy and the matter passed out of his mind. The information was not communicated to the son, though there was opportunity. In the afternoon the son took the hand-car, and with a boy companion went up the track to the north switch light. After lighting it they went down the main track by the station toward the south switch light. There was a sidetrack from a point near the station to where this light was to be placed, which they easily might have taken. They passed along, talking to each other and working the handle bars. So far as known, they did not look behind them. There was a heavy fog. The extra approached them from behind. It displayed no headlight, contrary to the rules of the company. It did not stop at the station, having no orders to do so. A short distance beyond the station it struck the hand-car and killed young Mead. The railroad employes claimed that they endeavored to stop the train on seeing the boys on the track. The locomotive whistled, but whether or not it whistled for the crossing, or whether it gave an alarm whistle before the accident occurred, was a matter of some dispute. The train was running at full speed.

The existence of an ordinance of the city prohibiting the running of cars through its limits at a speed exceeding eight miles an hour was put in issue. In proof of such ordinance the mayor, as a witness, produced the ordinance-book containing the record of the supposed ordinance. Objection was made that the book was not the minutes of the council's proceedings, nor did the record show that the ordinance had been signed by the mayor. Whereupon the former mayor was called, and a paper handed him, signed by himself, and he said by the city clerk, both in the presence of the council. He said it was passed in the evening and posted the next day. The paper was not at that time offered in evidence, but thereupon the plaintiff again offered the book of ordinances and read the ordinance therefrom. The record did not show that the ordinance had been signed by the mayor nor published. Later the original paper on which the ordinance was written, signed by the mayor and clerk, which had been identified by the witnesses, was admitted in evidence. Several of the rules of the company were given in evidence. After the parties had rested, but before the jury retired to their room, the plaintiff requested that the book of rules, which had been referred to and offered during the

trial, be sent to the jury to be used by them during their deliberations. This was done over the objection of the defendant. There was a judgment for the administrator, which was affirmed in the circuit court. The cause comes here for review.

Cooper & Moore and Watson, Burr & Livesay, for the plaintiff in error.

W. Stilwell and D. F. & J. D. Ewing, for the defendant in error.

539 DAVIS, J. In the theory of this case which seems to have been entertained by the trial court, there are several radical errors. Nearly all of them result from a misconception of the relation of the deceased to the plaintiff in error. That he was an employé of the railway company is not disputed; but at the time of the accident his position and his conduct were not within the scope of his duty. He was on the main track with the speeder for his own convenience and under circumstances which made his presence there uncalled for and dangerous in the extreme. Such acquiescence in the occasional use of the speeder by the deceased and his father, as may be implied in this case, at best amounts to no more than a permission for that purpose, and constituted the deceased a bare licensee. The company did not object to the use of the speeder, if it knew of it, nor did it offer any inducement or invitation therefor: 2 Thompson on Negligence, 2d ed., secs. 1722, 1723. The deceased took the license with its concomitant perils. The acquiescence in the use of the track with a speeder did not involve an undertaking on the part of the company to modify its rights as to the user of its own property; nor could it change its obligations to the public as a common carrier of passengers and freight. The trial court in this case, not without some warrant of authority it must be admitted, took the view, and so instructed the jury, that it was the duty of the railway company to exercise reasonable care, not only to avoid injury to the deceased after it discovered him upon the track, but that it was its duty to keep a careful lookout to discover and avoid injury to any person who might happen to be on its **540** track at that place and at that time, and that this duty was implied in the license to the deceased and his father. It was in this view, apparently, that the court refused to give to the jury the defendant's first request to charge, and instructed the jury instead that the defendant "had a right to run its cars at the time and place of the ac-

cident at any speed and in any manner consistent with safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all circumstances surrounding the locality, and having a due regard to the safety of persons who might be upon its tracks. It was required to use ordinary care in running its train, having due regard to the rights of others." Such a conception of the law is opposed to reason because a bare licensee must know that his license is subject to all the risks incident to the use of the track by the company, in the same manner in which it was used at the time the license was granted, and that the company assumes no new obligation or duty toward him. Therefore, the company owed him no duty of active vigilance to especially look out for and protect him: *Railway Co. v. Aller*, 64 Ohio St. 192, 60 N. E. 205; 3 Elliott on Railroads, sec. 1250. It is believed that it is also contrary to the weight of authority: 3 Elliott on Railroads, secs. 1250, 1251; 2 Thompson on Negligence, 2d ed., secs. 1709, 1711, 1712, 1723, 1724; *Louisville etc. Ry. Co. v. Vittitoe*, 19 Ky. Law Rep. 612, 41 S. W. 269. It may be added here that the rule is substantially the same as to trespassers and mere licensees—that is, licensees without invitation or inducement. An employé who goes upon the track or elsewhere upon the company's premises not in the line or discharge of his duty, and without any invitation, express or implied, is at most ⁵⁴¹ a mere licensee, to whom the company owes no duty to keep such place safe: 3 Elliott on Railroads, sec. 1251, 1303, and cases cited; *Railway Co. v. Marsh*, 63 Ohio St. 236, 58 N. E. 821; *Baker v. Chicago etc. Railway Co.*, 95 Iowa, 163, 63 N. W. 667; *Chicago etc. R. R. Co. v. McKnight*, 16 Ill. App. 596; 1 Thompson on Negligence, 2d ed., secs. 945, 946.

The doctrine of *Harriman v. Pittsburgh etc. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507, 12 N. E. 451, does not apply here, because there is in this case no pretense of acquiescence in the public use of the railway track in the way in which it was used by the deceased, nor was there any invitation or inducement held out to the deceased to so use it. There was, at most, only a failure to object to such user. We cannot think, therefore, that the trial court was right in instructing the jury as it did in this regard, and in refusing to instruct as requested in the defendant's first request.

In this connection we will consider the instructions of the court to the jury in regard to signals. Seemingly having in mind the erroneous theory criticised above, the trial court called

the attention of the jury to the fact that evidence had been introduced by the plaintiff tending to show that the defendant had neglected and failed to give the statutory signals required on approaching and passing a public crossing, and the jury were instructed that it was for them to determine, from the evidence, whether such signals were given or not, and that their conclusion on that subject would be one of the elements which they should consider in determining whether the defendant was guilty of negligence that produced, in whole or in part, the death of the deceased; and further, that the deceased was bound to use reasonable precautions to detect the approach of trains, and was ⁵⁴² bound to know that the defendant might run a train over the road at that point at any time, "unless lulled into a feeling of security by the failure of the defendant's employes, in charge of its train, to observe the statutory regulations and rules of the company in the matter of running and management of the train, at the time and place of the accident and under the circumstances shown by the evidence." It was also charged that the deceased, while in the employment of the company, and when at or near a public street crossing, had a right to expect the performance of that duty. The accident did not happen at or near the crossing, but more than six hundred feet west of it, and not while the deceased was crossing the track, but while he was traveling longitudinally upon it.

Independently of the theory of liability to a bare licensee, which we have already discussed, this raises the question whether the statutory duty to give signals when approaching a crossing inures to the benefit of persons on the track and not at a crossing. The statute obviously is not for the protection of persons who are not crossing the track or about to do so; for not only is the whistle to be sounded before reaching the crossing, but the bell is to be continuously rung until the crossing is passed. The signals are not required at any other time. This is the construction which has been adopted in several jurisdictions where the question has arisen. It was fully considered and distinctly decided in *Railroad Co. v. Depew*, 40 Ohio St. 121, 127-129. Also in the following cases: *O'Donnell v. Providence etc. R. R. Co.*, 6 R. I. 211; *Harty v. Central R. R. Co.*, 42 N. Y. 468; *Williams v. Chicago etc. R. R. Co.*, 135 Ill. 491, 25 Am. St. Rep. 397, 26 N. E. 661; *Chicago etc. R. R. Co. v. McKnight*, 16 Ill. App. 596; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Toomey v. Southern Pac. R. R. Co.*, 86 Cal. ⁵⁴³ 374, 24 Pac. 1074; *Hale v. Columbia etc. R. R. Co.*, 34 S. C. 292, 13 S. E. 537;

Atlantic etc. Co. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550; 2 Thompson on Negligence, 2d ed., sec. 1707. There being no legal duty in that regard due from the defendant to the deceased, this instruction to the jury was erroneous.

Up to this point we have endeavored to consider the questions of law which were under review without complicating them with the subject of contributory negligence. It becomes necessary now to look at that phase of the case. The court refused to instruct the jury as requested in the defendant's fourth request. This instruction was sound and ought to have been given. If it were found to be true that the deceased chose to travel with the speeder upon the main track for no reason connected with his employment other than his convenience; that he rode down the main track with a companion, on the speeder, in violation of the order of his superior, the station agent; that from the station to the south switch light there was a "passing track" on which he could have placed the speeder and easily and with absolute safety have reached his destination, and that instead of doing so he chose to go down the main track, without keeping any lookout behind him—there can be no doubt that he was guilty of negligence which proximately contributed to his own injury, unless the defendant could have avoided the injury after discovering the deceased upon the track. The authorities sustaining this proposition are so numerous that it would be practically impossible to cite them all here. We content ourselves with citing a few pertinent cases and leading text-writers, with the cases collected and cited by them: 3 Elliott on Railroads, sec. 1303, and cases cited in notes thereto; 2 Thompson on Negligence, 2d ed., secs. 1734, 1738, 1747, 1748, 1774, and ⁵⁴⁴ cases cited in notes thereto; Ream v. Pittsburgh etc. R. R. Co., 49 Ind. 93; Railroad Co. v. Depew, 40 Ohio St. 121; Burling v. Illinois Cent. R. R. Co., 85 Ill. 18. It will be seen from these authorities that the instruction, as requested, states the law more strongly against the company than was necessary. It makes the qualification that "unless the jury shall further find that the defendant's agents and employes . . . could have avoided said accident after they became aware of the presence of the said Arleigh J. Mead upon said track." Strictly speaking, the law would require the defendant, after discovering the deceased to be upon the track, to use reasonable care under the circumstances to avoid the accident, not absolutely to avoid it; but this being an error against the party asking the instruction, it should not have been refused for that rea-

son. Besides, the instruction which was asked specifically challenged the attention of the jury to some very important circumstances affecting the claim of contributory negligence, and the error of refusing this is nowhere cured in the charge as given.

Again, the defendant asked the court to charge the jury that the plaintiff could not recover on account of, or by reason of, any negligence on the part of James H. Mead, the father of the deceased, at that time the agent of the defendant; and also that plaintiff could not recover for any pecuniary loss suffered by the father of deceased, on account of the death of his son, if the jury should find that the father was guilty of negligence directly contributing to the death of his son. These requests were refused. There was, it is true, no issue in the pleadings upon this subject; but the court did charge the jury that "in arriving at the total amount of damages in the case, the jury ⁵⁴⁵ should consider the pecuniary injury to each separate beneficiary, but the verdict should be for a gross sum not exceeding ten thousand dollars," and that "what has each separate beneficiary lost in money in the death of Arleigh J. Mead, will be your inquiry. First determine the value of his life to the father, next the value of his life to his mother." etc. Having done this, and having given the jury the plaintiff's requests numbered 13 and 19, the defendant's request that the jury should also be instructed that the plaintiff would not be entitled to recover for any pecuniary loss of the father, if the jury should find that the father was guilty of negligence directly contributing to the death of the son, could not properly be refused: *Wolf v. Lake Erie etc. Ry. Co.*, 55 Ohio St. 517, 45 N. E. 708.

The trial court and the counsel for the defendant in error seem to have entertained the view that the question raised concerning the ordinance of Buckeye City related to the validity and effect of the ordinance; but the issue in the pleadings was as to the legal passage and existence of the ordinance. The evidence to show the existence of the ordinance was clearly incompetent and insufficient, and the charge of the court did not cure the error of admitting it. It left the ordinance with the jury, as if it were a proven fact, instructing them that it was a circumstance to be taken into consideration, "in connection with all other facts and circumstances, in determining whether the defendant was negligent in the running of the train in the manner in which you find the evidence shows it was run at the time and place of the accident; and also in determining whether the deceased was guilty of negligence that contributed to cause his death." Nothing more needs to be said on that subject.

546 Another manifest error was the sending of the book of rules to the jury to be used by them in their deliberations, only a few of the rules having been offered in evidence. Upon this record we would not reverse for that error, because it does not clearly appear that the company was prejudiced thereby; but we mention it in order that we may not seem to have approved it, and for the guidance of the trial court hereafter.

The judgments of the circuit court and the court of common pleas are reversed.

Burket, Spear, Shauck, and Price, JJ., concur.

Railroads—Signals at Crossing.—The statutory requirement as to the giving of signals when a train approaches a crossing is only for the benefit of persons about to cross the track: *Louisville etc. R. R. Co. v. Hall*, 87 Ala. 708, 13 Am. St. Rep. 84, 6 South. 277; *Williams v. Chicago etc. R. R. Co.*, 135 Ill. 491, 25 Am. St. Rep. 397, 26 N. E. 661; *Atlanta etc. Ry. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145, 20 S. E. 550.

Railroads—Licensee on Track.—The duty of a railroad company to a licensee on its track is to exercise toward him ordinary care and prudence: *Virginia Midland Ry. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874, 5 S. E. 573; *Spotts v. Wabash Western Ry. Co.*, 111 Mo. 380, 33 Am. St. Rep. 531, 20 S. W. 190. Perhaps a more correct statement of the law is, that no duty is owed to him except that of not willfully or wantonly injuring him: *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329, 32 Am. St. Rep. 859, 15 S. E. 81. See, also, *Clark v. Michigan Cent. R. R. Co.*, 113 Mich. 24, 67 Am. St. Rep. 442, 71 N. W. 327; *Pomponio v. New York etc. R. R. Co.*, 66 Conn. 528, 50 Am. St. Rep. 124, 34 Atl. 491; *Highland Avenue etc. R. R. Co. v. Robbins*, 124 Ala. 113, 82 Am. St. Rep. 153, 27 South. 422. As to who is a licensee, see *Woolwine v. Chesapeake etc. Ry. Co.*, 36 W. Va. 329, 32 Am. St. Rep. 859, 15 S. E. 81.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HARRIS v. BROWN.

[202 Pa. St. 16, 51 Atl. 586.]

LICENSE, Without Consideration, is Determinable at the pleasure of the licensor. (p. 611.)

LICENSE—When not Revocable.—If the enjoyment of a license must necessarily be and is preceded by the expenditure of money, such license becomes an agreement on a valuable consideration, and is irrevocable. (p. 611.)

LICENSE to Use Partnership Name—When Irrevocable.—If the purchaser of partnership property at sheriff's sale is authorized by the persons forming such partnership to use the partnership name, at that time valueless, in the continuation of the business, and the purchaser, by the expenditure of large sums of money with the knowledge and consent of such persons, builds up the business, making it a success, and giving to such partnership name a value it did not possess at the time he began to use it, neither of such persons can thereafter enjoin him from the further use of the firm name. (p. 612.)

R. L. Ashhurst and J. G. Johnson, for the appellant.

J. F. Keator and R. C. Dale, for the appellees.

21 MESTREZAT, J. The learned trial judge very properly found that Mrs. Brown did not purchase the machinery and stock of goods of Harris Brothers & Company at the sheriff's sale in pursuance of a contract with Andrew Harris to continue the business in trust for him, and, subsequently, to transfer it to him. The four years of management of the business by him and his brother had brought the firm to insolvency and rendered the firm name commercially valueless. Mrs. Brown, his mother, knew these facts, and could have had no desire or intention to place the business again in the hands

of her son. To preserve the business and to put it on a paying basis required that Andrew Harris' connection with it should cease. He had demonstrated conclusively his unfitness to manage it successfully and further control of it by him as manager or owner would have insured its total destruction. The facts disclosed by the testimony show that Mrs. Brown was acting for herself and with no intention of reinstating Andrew Harris in the gas meter business.

Immediately after the sheriff's sale at which Mrs. Brown had acquired the title to the personal property of Harris Brothers & Company, and before she began to manufacture gas meters, a conference took place at the office of her counsel in which he, Mrs. Brown, and Andrew Harris participated. They discussed the manner in which the business should be carried on ²² and the name under which it should be conducted. Mr. Harris suggested that there should be as little change in the conduct of the business as possible and agreed that the business should be continued indefinitely in the name of Harris Brothers & Company. In addition to this express assent, his subsequent conduct was clearly a license to Mrs. Brown to use the firm name in the transaction of the business. It is contended, however, on the part of the plaintiff, that the consent of Harris to the use of the firm name did not authorize his mother to use it against his objections; that he could withdraw his permission at any time and that thereafter the right of Mrs. Brown to use the firm name in her business ceased. The learned trial judge took this view and held that "it was a license without consideration and revocable at the will of the licensor." It is undoubtedly true that a mere license without consideration is determinable at the pleasure of the licensor. But that is not the rule in this state where the enjoyment of the license must necessarily be, and is, preceded by the expenditure of money. In such cases, the license becomes an agreement on a valuable consideration and is irrevocable: *Reick v. Kern*, 14 Serg. & R. 267, 16 Am. Dec. 497; *McKellip v. McIlhenny*, 4 Watts, 317, 28 Am. Dec. 711; *Willis v. Erie City Pass. Ry. Co.*, 188 Pa. St. 66, 41 Atl. 307. We can see no reason why this principle is not applicable here. At the time Mrs. Brown purchased the property at sheriff's sale, there was practically no value in the goodwill of the business or in the firm name. The firm of Harris Brothers & Company was composed of Andrew Harris and Ernest L. Harris, and had been in existence only since 1890. Commercial value in connection with

the gas meter business had been given the name "Harris," not by the success of this firm, but by that of Harris, Griffin & Company, in which Andrew Harris, senior, the father of Andrew and Ernest L. Harris, was a member. The gas meter business conducted under the firm name of Harris Brothers & Company was unsuccessful, and in 1894 culminated in insolvency and a sheriff's sale of the personal property, the proceeds of which were insufficient to liquidate the firm's indebtedness. The cause of the failure is immaterial; the fact is important. It was at this time, when the name of Harris Brothers & Company had no commercial value in the business of manufacturing gas meters, that Andrew Harris suggested to his mother that she use the ²³ name in continuing the business. She acted upon the suggestion and proceeded to carry on the business in that name. By the necessary expenditure of money and the application of proper business methods, Mrs. Brown was successful. In this way she established a reputation for the name of Harris Brothers & Company and gave it commercial value which, as far as the testimony discloses, it did not possess at the time she began to use it. After nearly four years, and the expenditure of large sums of money, with the knowledge and consent of the plaintiff in building up the business by which alone the name was given value, this bill is filed by the plaintiff to deprive the defendant of the property value she has given to it. To permit such a result would be inequitable and unjust. Having suggested, and consented to, the use of the firm name in continuing the business, Harris is not now, under the circumstances shown by the testimony, in a position to demand of his mother that she discontinue its use or account for any moneys realized by its use. The plaintiff is here invoking the aid of a chancellor, not to enforce an equity, but to deprive another of property to which she is both equitably and legally entitled. He could not succeed in a court of law, and with much less reason should he be permitted to enforce his claim in a court of equity.

The assignments of error are dismissed and the decree is affirmed.

A license without consideration may be revoked: Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470. See, too, Ewing v. Rhea, 37 Or. 583, 82 Am. St. Rep. 783, 62 Pac. 790. Parol licenses and their revocation are considered in the monographic note to Laurence v. Springer, 31 Am. St. Rep. 712-719. A license may become an agreement for a valuable consideration, as where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the licensee

has made improvements or invested capital in consequence of a license, he has become a purchaser for a valuable consideration: *Metcalf v. Hart*, 3 Wyo. 513, 31 Am. St. Rep. 122, 27 Pac. 900, 31 Pac. 407.

COMMONWEALTH v. KEVIN.

[202 Pa. St. 23, 51 Atl. 594.]

PURE FOOD LAWS—Interpretation.—A statute to provide against the adulteration of food, declaring that an article of food shall be deemed to be adulterated “if it contains any substance or ingredient which is poisonous or injurious to health,” absolutely prohibits the addition to a food product of any foreign substance poisonous or injurious to health, regardless of the quantity used, or whether or not the quantity of the substance used was sufficient to make the adulterated article poisonous or injurious to health. It is not the quantity but the nature, of the substance added which the act prohibits. (pp. 614, 616.)

CONSTITUTIONAL LAW—Pure Food Laws.—The legislature may determine whether the addition of a poisonous or injurious substance to a food article endangers the health of the citizens of the state who use the compound, and if it does, then it is clearly within the police power of the state to prohibit the manufacture and sale of the adulterated article as well as to protect the public from imposition or fraud in the sale of it. The exercise of such authority by the legislature does not transcend the constitutional limit of its power. (p. 617.)

T. W. Reath, E. F. Hoffman, and T. Reath, for the appellant.

C. E. Bartlett, C. L. Brown, and J. Weaver, district attorney, for the appellee.

25 MESTREZAT, J. The defendant, who is engaged in the grocery business in the city of Philadelphia, was tried and convicted in the court of quarter sessions of Philadelphia county on an indictment charging him with having sold “one pint of raspberry syrup, the said raspberry syrup then and there containing an added substance and ingredient, to wit, salicylic acid, which is poisonous and injurious to health.” The indictment was found under the act of June 26, 1895 (Pub. Laws, 317), entitled “An act to provide against the adulteration of food and providing for the enforcement thereof,” and commonly known as the pure food law. The first section prohibits the manufacture or sale of adulterated food, the second section defines the term “food” as used in the act, and the third section provides, inter alia, that “an article shall be deemed to be adulterated within the meaning of this act:

(a) In case of food: (7) If it contains any added substance or ingredient which is poisonous or injurious to the health." The defendant was indicted for a violation of the seventh clause of the third section of the act.

On the trial of the cause it was shown that the defendant had sold a bottle of raspberry syrup, and it was admitted by him that it contained salicylic acid. It appeared from the evidence that the acid was a substance foreign to raspberry syrup. Expert testimony was introduced by the commonwealth and the defendant to prove what salicylic acid is, and whether it is poisonous and injurious to health. The commonwealth expert made an ²⁶ analysis of the syrup and testified that the acid was injurious to health; that it was dangerous because it was apt to produce disease; that the words "poisonous" and "injurious to health" were almost synonymous in cases where the poison is not always fatal; that if continuously used, the acid is injurious to health in any quantity, but if not so used its injuriousness would depend upon the person taking it. The defendant's expert testified that salicylic acid would not be classed in the group of poisons; that whether or not it is poisonous or injurious depends upon the amount taken and how it is used, which applies to arsenic or any other poison; that if the acid was taken in a harmful amount it would affect injuriously the digestion, the kidneys and the heart; that all poisons must be administered medicinally and that witness had known of salicylic acid being administered beneficially in medicinal doses; that the acid is a substance foreign to raspberry syrup.

The trial court submitted the case to the jury and charged that the only question to be determined by them was whether or not salicylic acid was poisonous or injurious to health; that if it was, it was the duty of the jury to convict. A verdict of guilty was returned by the jury, and the defendant, having been sentenced, appealed to the superior court, which, by a divided court, affirmed the judgment of the trial court. He thereupon appealed to this court.

The determination of the several assignments of error involves a consideration of clause 7 of section 3 of the act of June 26, 1895, under which the indictment was found. The learned trial judge held that the clause prohibited the addition to a food product of any foreign substance poisonous or injurious to health, regardless of the quantity used or whether or not the quantity of the substance used was sufficient to make

the adulterated article poisonous or injurious to health. In other words, it is not the quantity but the nature of the substance added which the act prohibits. The court held that if the foreign substance added to an article of food is poisonous or injurious in any quantity, the statute declares it to be an adulteration. The case was tried upon this construction of the act, and the rulings of the trial court, assigned for error in the superior court and on this appeal, are based upon that interpretation of the statute.

27 The learned counsel for the defendant contend that the act is not violated unless the quantity of the foreign substance is sufficient to make the compound poisonous or injurious to health. They state their position in their fourth point for charge which is as follows: "The defendant in this case is indicted for selling one bottle of syrup, and if the jury should find from the evidence that the single bottle actually sold did not contain salicylic acid in sufficient quantities to be poisonous or injurious to health, then your verdict must be for the defendant."

We are not prepared to adopt this construction of the clause of the section under consideration. The purpose of the statute was to prevent the adulteration of food, the term "food" including all articles used for food or drink by man. The act clearly defines what shall be deemed an adulterated article, within the meaning of its terms. The third section is subdivided into seven clauses, each defining or designating an article or compound that shall be considered as adulterated. Food is adulterated under this section: 1. If any substance or substances have been mixed with it so as to lower or depreciate or injuriously affect its quality, strength or purity; 2. If any inferior or cheaper substance or substances have been substituted wholly or in part for it; 3. If any valuable or necessary constituent or ingredient has been wholly or in part abstracted from it; 4. If it is an imitation of or is sold under the name of another article; 5. If it consists wholly or in part of a diseased, decomposed, putrid, infected, tainted or rotten animal or vegetable substance or article, whether manufactured or not, or in case of milk if it is the product of a diseased animal; 6. If it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; 7. If it contains an added substance or ingredient which is poisonous or injurious to health.

Such are the articles which are prohibited from being manufactured or sold as food in this commonwealth. The object of the statute is to protect the public health by securing pure food, and to prevent fraud and deception in the manufacture and sale of adulterated articles of food. The purpose of the legislature in the passage of the act is most commendable, and the ²⁸ statute should receive a construction by the courts that will fully and effectively accomplish the object of its enactment.

It will be observed that the third section is not directed against the manufacture or sale of adulterated food, but declares what shall be deemed and taken to be an adulteration of food. Each of the several clauses is couched in explicit and unambiguous terms. The language of the clause under which this indictment was framed is plain and admits of but one meaning. It is, therefore, not necessary to resort to technical rules of construction in aid of its interpretation. "Whatever may have been the legislative thought," says Thompson, J., in *Bradbury v. Wagenhorst*, 54 Pa. St. 182, "no ambiguity exists in what they said, and when the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith." It is not a poisonous or injurious compound resulting from the addition of a foreign ingredient that the seventh clause declares to be an adulterated article. If it were, the position of the defendant would be correct and under the testimony in the case he would have been entitled to an acquittal. The evidence introduced on the trial and admitted by the court, however, was to show that the foreign substance added to the food product was poisonous and injurious to health. That is clearly what the clause declares shall constitute an adulteration. Its language is: "If it [the adulterated food] contains any added substance or ingredient which is poisonous or injurious to health." The terms of the clause, therefore, declare against a compound that is formed by the addition of a poisonous or injurious ingredient and not against a compound that is poisonous or injurious to health. This interpretation is supported by the plain and explicit language of the clause as well as by the manifest purpose of the legislature in its enactment. An article resulting from the addition of a poisonous substance, the legislature believed would be unhealthy, and hence its manufacture and sale is forbidden by the first section of the act. The guilt of the defendant, therefore, did not depend upon the nature or

character of the compound resulting from the addition of the salicylic acid to the fruit syrup, but was to be determined solely upon the poisonous or injurious qualities of the acid which was the ingredient added to the food.

The seventh clause of the act, as construed, does not offend ²⁹ against any provision of the constitution of the commonwealth. It does not prevent the admixture of pure articles as a food nor prohibit the addition of a healthful ingredient as a fruit preservative. It is directed against the introduction into a food product of a substance foreign to it and of a poisonous or injurious nature. As said above, the purpose of the act was twofold: to protect the public health and to prevent fraud and deception in the manufacture and sale of adulterated food. It is within the province of the general assembly to determine whether the addition of a poisonous or injurious substance to a food article endangers the health of the citizens of the state who use the compound, and if it does, then it is clearly within the police power of the state to prohibit the manufacture and sale of the adulterated article as well as to protect the public from imposition or fraud in the sale of it. The exercise of such authority by the legislative department of the government does not transcend the constitutional limit of its power. In *Powell v. Commonwealth*, 114 Pa. St. 294, 60 Am. Rep. 350, 7 Atl. 913, Sterrett, J., after reviewing the cases holding legislation to be constitutional on the ground that it was the lawful exercise of the police power of the state, says: "The manufacture, sale and keeping with intent to sell may all alike be prohibited by the legislature, if in their judgment the protection of the public from injury or fraud requires it. To deny the authority of the legislature to do so is to attack all that is vital in the police power. To refuse recognition of the power in a given case, because in the judgment of some the legislature, though acting within its proper sphere, may have mistaken the public necessity for a law prohibitory in its character, is to make the individual judgment superior to that of the legislature, to which the people in their sovereign capacity have delegated the law-making power."

There was ample evidence, if believed, to warrant the jury in finding that salicylic acid is poisonous and injurious to the human system. No other conclusion would have been justified by the evidence. It is equally clear that the manufacturers of the raspberry syrup sold by the defendant were concealing its true ingredients from the public. This is mani-

fest from the label on the bottle on which is printed: "Warranted pure and unadulterated fruit syrup." The testimony in this case discloses the fact that the syrup is not in a "pure and unadulterated" ³⁰ condition, but that it contains an ingredient foreign to its natural state.

We are of opinion that the learned trial judge properly interpreted the act of assembly under which this indictment was drawn, and that therefore his rulings on the admission of testimony and his answer to points for charge, which are complained of in the assignments of error, were correct.

The judgment of the superior court is affirmed.

Pure Food Law.—The legislature is competent to make it a crime to sell adulterated articles of food or drink: See the monographic notes to *Booth v. People*, 78 Am. St. Rep. 261, 262; *State v. Rogers*, 85 Am. St. Rep. 400-403. For statutes prohibiting the adulteration of milk, see *State v. Schlenker*, 112 Iowa, 642, 84 Am. St. Rep. 360, 84 N. W. 698; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; and for an act prohibiting the use of alum in articles of food, see *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171. A manufacturer or vender may be required to label his articles with a quantitative analysis of their ingredients: Note to *Booth v. People*, 78 Am. St. Rep. 261, 262; *State v. Sherod*, 80 Minn. 446, 81 Am. St. Rep. 268, 83 N. W. 417. But a statute is not valid which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act: *People v. Biesecker*, 169 N. Y. 53, 88 Am. St. Rep. 534, 61 N. E. 990.

MENCKE v. ROSENBERG.

[202 Pa. St. 131, 51 Atl. 767.]

EXECUTION SALES—Sheriff's Deeds — Conclusiveness of Acknowledgment of.—If land is sold by a sheriff under a testatum fieri facias, and his deed therefor is duly acknowledged, its validity cannot be attacked as against the purchaser by the trustee in bankruptcy of the defendant in execution, on the ground that the fieri facias has not been delivered to the clerk of the county where the land is situated, and by him recorded as required by statute. The failure to record the writ is a mere irregularity, cured by the acknowledgment of the deed. (p. 621.)

EXECUTION SALES—Authority of Sheriff.—Under statutory authority a sheriff has power to sell land situated in his county under a writ of execution issuing out of the court of common pleas of another county. (p. 620.)

EXECUTION SALES—Sheriff's Deeds — Conclusiveness of Acknowledgment of.—The acknowledgment of a sheriff's deed is a judicial act, and concludes all mere irregularities, however gross, in the process and sale, and, after such acknowledgment, the validity of the title acquired by the purchaser cannot be questioned in a

collateral action, except for the absence of authority, or the presence of fraud in the sale. (p. 621.)

BANKRUPTCY—Construction of Statute.—Section 67 of the national bankruptcy act of 1898, relating to liens obtained within four months prior to bankruptcy proceedings, applies to voluntary, as well as to involuntary, bankrupts. (p. 623.)

BANKRUPTCY—Void Lien.—Under section 67 of the national bankruptcy act of 1898, declaring void all liens obtained through legal proceedings against an insolvent within four months prior to the filing of a petition in bankruptcy against him, a lien obtained by a writ of alias testatum fieri facias on land in another county than that in which judgment is rendered within such four months is void, although the judgment was obtained prior to such four months, unless the purchaser at the sheriff's sale under such fieri facias shows that he is within the provision of such bankrupt act which protects a bona fide purchaser for value of the land of a bankrupt without notice of his insolvency or reasonable cause of inquiry, and this is a question of fact for the jury to decide. (pp. 625, 626.)

G. B. Johnson, for the appellant.

A. M. Holding, D. S. Talbot, and J. F. E. Hause, for the appellee.

133 MESTREZAT, J. In 1899 Emanuel Rosenberg was the owner of certain real estate in Chester county, Pennsylvania, the title to which he acquired in 1895, 1896 and 1897. By deed dated November 2, 1899, and recorded in the prothonotary's office of Chester county, the sheriff of said county conveyed to Lillie Rosenberg, the **134** wife of Emanuel Rosenberg, the above real estate sold as the property of her husband and purchased by her at sheriff's sale on October 28, 1899. It appears from this deed that the property was sold on an alias testatum fieri facias, tested September 25, 1899, and issued on a judgment against Emanuel Rosenberg for eleven thousand seven hundred and twenty-nine dollars and twelve cents, entered May 28, 1898, in the court of common pleas No. 1, of Philadelphia county. The testatum writ was not entered of record in the prothonotary's office of Chester county, as required by the act of June 16, 1836. On November 24, 1899, Emanuel Rosenberg was adjudged a bankrupt upon his own petition, and on January 9, 1900, John B. Mencke was appointed trustee of his estate. The record does not disclose when the petition in bankruptcy was filed. The trustee brought this action of ejectment on January 22, 1901, to recover from Lillie Rosenberg the real estate conveyed to her by the sheriff of Chester county. The jury found a verdict for the defendant, and judgment having been entered thereon, the plaintiff has appealed.

The substance of the appellant's contention is that the court erred (1) in admitting in evidence the deed of the sheriff to Mrs. Rosenberg, (2) in excluding certain offers of proof of alleged fraud, and (3) in holding that clause (f) of section 67 of the bankrupt act of 1898 had no application to the facts of this case. In his opinion dismissing the motion for a new trial, the learned judge has sufficiently shown that there was no error in refusing the proposed evidence of fraud, and we need not discuss the question here.

The real estate of Emanuel Rosenberg, the subject of this controversy, is situated in Chester county and was sold on an alias testatum fieri facias issued out of the court of common pleas No. 1, of Philadelphia county. When the defendant's counsel offered the sheriff's deed, the plaintiff objected to its admission 'upon the ground that there is no evidence showing the record of a writ of alias testatum fieri facias in this court, as required by the act, and no petition praying for leave to acknowledge the deed, so that the sheriff might give notice as required by the act of June 16, 1836, section 37, in the manner provided for service of a writ of summons in a personal action; and the offer of the deed has not been preceded by the offer of any judgment or writ thereunder upon which it is based, which is required by ¹³⁵ the decisions." The court below overruled the objection and admitted the deed in evidence. The consideration of the competency of this offer will be confined to the specific objections made thereto.

The latter part of the plaintiff's objection to the offer we need not consider, as the evidence offered by the appellant himself shows that the writ upon which the property was sold was an alias testatum fieri facias, and was issued on a judgment entered in the court of common pleas No. 1, of Philadelphia county. The act of June 16, 1836 (Pub. Laws, 775), authorized the issuing of a testatum fieri facias by the common pleas of Philadelphia county directed to the sheriff of Chester county, on which the land of the defendant in the execution in the latter county could be taken in execution and sold. There was, therefore, legal authority for the issuance of this writ which empowered the sheriff of Chester county to levy and sell the real estate in controversy. It is not alleged that there was any fraud in the sale that vitiates the proceedings. The learned counsel for the plaintiff, however, denies the validity of the sale because the writ was not delivered to the prothonotary of Chester county, and by him entered of record

as required by statute. But can that affect the authority of the sheriff to proceed on the writ or the title of the purchaser to the real estate sold under it after he has received the sheriff's deed? The sheriff is commanded by the court issuing the writ to levy upon and sell the defendant's real estate in Chester county, and it is no part of the mandate of the writ that he shall deliver it to the prothonotary, and that the latter shall record it. The statute, and not the writ, requires the sheriff to perform that duty. In the case in hand, it is not denied that the sheriff obeyed the exigency of his writ, and in pursuance thereof sold the real estate in dispute to the defendant in this action. The fact that he failed to observe the statutory directions complained of in the counsel's objection to the evidence will not injure the plaintiff's cestui que trust, nor will it deprive him of any rights to which he is entitled. The statute does not make the recording of the writ essential to the validity of the sale, at least to the extent of invalidating a sale after the acknowledgment of the sheriff's deed. We need not inquire as to the reason of the provision of the act directing the writ to be entered of record in the ¹³⁶ county in which the land lies. If this were a contest between the lien creditors of Emanuel Rosenberg, in Chester county, the issue would be different and the failure to record the writ in that county might become material.

This is a proceeding collateral to that under which the land was sold. The acknowledgment of the sheriff's deed passed a valid title to the purchaser unless there was fraud or want of authority in the sale. As suggested above, the statute conferred the authority and fraud in the sale is not alleged. The failure to record the writ in Chester county, therefore, will be regarded as a mere irregularity which did not affect the validity of the sale after the acknowledgment of the deed.

"In numerous cases," says Clark, J., in *Cock v. Thornton*, 108 Pa. St. 640, "it has been held by this court that the acknowledgment of a deed is a judicial act, and concludes all mere irregularities, however gross, in the process and sale. After acknowledgment, the validity of the title acquired by the purchaser cannot be questioned in a collateral action involving the title, except for the absence of authority or the presence of fraud in the sale."

The remaining and important question requires a consideration of the answer of the court to the plaintiff's first point for charge which is the subject of complaint in the ninth assign-

ment of error. In his answer to the point the learned trial judge negatived the proposition that the defendant having purchased the real estate in dispute after the insolvency of her husband and within one month of his adjudication in bankruptcy was required to show "that she acquired the same without notice of his insolvency or reasonable cause of inquiry." This ruling, as stated by the judge, was based upon the ground that the judgment in Philadelphia county upon which the testatum fieri facias issued was not entered within four months of the adjudication in bankruptcy. In his opinion refusing a new trial the learned judge says in support of his ruling: "We think no error was committed in ruling that the defendant's knowledge of her husband's insolvency did not invalidate her purchase. The judgment under which the real estate was sold was entered and was a lien much more than four months before Emanuel Rosenberg became a bankrupt, and moreover under the express language of the clause of the ¹³⁷ act depended upon by the plaintiff, its provisions do not apply to a case of voluntary bankruptcy as was Rosenberg's."

It will be observed that the ruling of the learned trial judge was based upon two grounds: 1. That section 67 (f) of the act of Congress does not apply to a case of voluntary bankruptcy; and 2. That clause (f) did not avoid the proceedings on the writ because the judgment on which the writ issued was entered more than four months prior to the adjudication in bankruptcy of Rosenberg.

The part of the national bankruptcy act of 1898 involved in this controversy is section 67 (f), which is as follows: "That all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate; and thereupon, the same may pass to and shall be preserved for the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect; provided, that nothing herein contained shall have

the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

We are clearly of opinion that the clause of the bankruptcy act in question applies to a voluntary bankrupt. There is no reason why the creditors of a voluntary bankrupt should be permitted to acquire liens within the period named by the statute and those of an involuntary bankrupt should be denied that privilege. Nor is it apparent why Congress should make such a distinction between the two classes of bankrupts. On the contrary, there is every reason why they should be placed on an equality, which is the basic principle of the bankrupt act. The only possible ground for the contention that Congress intended ¹³⁸ such inequality is that the language of the clause under consideration shows that it applies to cases in which a petition in bankruptcy is filed "against him" (the bankrupt). This might be sufficient to overcome the presumption that the creditors of all insolvents were to be put upon the same basis and to be protected alike, was it not for the fact that the language of the clause is explained and defined by the act itself. It is, therefore, not open to construction by the court but is interpreted by another section of the same act. The first section of the act of 1898 construes the words and phrases used in the act and provides, *inter alia*, as follows: "'A person against whom a petition has been filed' shall include a person who has filed a voluntary petition." This we regard as decisive of the construction which should be given the words "against him" used in the clause in question. The weight of federal authority, including a decision of the district court of the United States for the western district of Pennsylvania unquestionably favors this construction of the clause: *In re Rhoads*, 98 Fed. 399; *In re Dobson*, 98 Fed. 86; *In re Emslie*, 98 Fed. 716; *In re Richards*, 95 Fed. 258; *In re Lesser*, 100 Fed. 433; *In re Kemp*, 101 Fed. 689. There can be no question that under the evidence, Rosenberg was insolvent at the time the sheriff of Chester county levied on and sold his real estate to Mrs. Rosenberg.

The other reason assigned by the trial judge for holding that section 67 (f) had no application to the case in hand is, in our judgment, equally untenable. It is conceded that the testatum writ was issued on a judgment entered in the common pleas of Philadelphia county more than four months prior to the filing of the petition in bankruptcy. It is not, however,

the date of the entry of the judgment that determines the validity of the proceedings on which the sale of Rosenberg's real estate was had. The clause provides "that all levies, judgments, attachments or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt." It is, therefore, a lien acquired within four months of the filing of the petition in bankruptcy against an insolvent which the act declares to be void. Had the plaintiff in the judgment issued ¹³⁹ an execution to enforce the lien of the judgment, he could have done so without offending against this clause of the bankrupt act. Had a writ of execution been levied on real estate in Philadelphia county on which the judgment was a lien, he could have proceeded to execution and sale without violating this clause of the statute. But when he issues a writ on which he acquires a lien, other and different from that of his judgment, it is the lien of this writ and not the judgment that determines the validity of the proceedings. In Pennsylvania a judgment is a lien on real estate in the county in which it is entered from the date of its entry, but not on personal property. To acquire a lien on the latter a fieri facias must be issued and placed in the hands of the sheriff. From that date it binds the personal property of the debtor and subjects it to the payment of his debts. It is clear, therefore, that while the plaintiff in the judgment in question, might within four months of the filing of the petition in bankruptcy have enforced his judgment lien against the debtor's real estate in Philadelphia county, it is equally certain that within that time he could not have enforced the payment of his judgment by an execution against the debtor's personal property. The obvious reason is that in the one case he is enforcing a valid lien, and in the other he is attempting to enforce a lien obtained within the prohibited period, declared by the act to be null and void, and hence incapable of being enforced. As is well understood, the testatum writ issues in the county in which the judgment is entered to the sheriff of another county in which the debtor has property. The lien of the judgment is confined to the real estate of the debtor in the county in which it is entered, and a testatum writ does not extend it beyond the territorial limits of the county in which the judgment is entered. It is, therefore, apparent that the only lien obtained through the legal proceed-

ings against Rosenberg resulting in the sale of his real estate in Chester county, was by virtue of the alias testatum fieri facias which was issued September 25, 1899. The sheriff's sale took place on October 28, 1899, and his deed, conveying to the defendant the real estate in dispute, was acknowledged on November 2, 1899. While the date of the filing of the petition in bankruptcy does not appear, the evidence shows that Rosenberg was adjudged a bankrupt on November 14th 28, 1899, which was within four months of the time when the lien on his real estate was obtained.

The act of June 16, 1836 (Pub. Laws, 775), requires the writ to be recorded in the county to which it is issued, and provides that it "shall be a lien upon the real estate of the defendant named in such writ, within the county where it shall be so entered of record, during five years from the date of such entry." As we have seen, this provision of the statute was not complied with, but, for the reason stated above, we do not think that the failure to record the writ invalidates it or the sale made upon it. The seizure of, and levy on, the real estate of Rosenberg in Chester county, by virtue of the alias testatum fieri facias created a lien thereon regardless of the effect of the act of 1836: *Stauffer v. Commissioners of Lancaster County*, 1 Watts, 300, 26 Am. Dec. 69; *Packer's Appeal*, 6 Pa. St. 277; *Davis v. Ehrman*, 20 Pa. St. 256. By the principles of the common law a lien is a necessary and inseparable incident of a seizure in execution: *Stauffer v. Commissioners of Lancaster County*, 1 Watts, 300, 26 Am. Dec. 69; *Glass v. Gilbert*, 58 Pa. St. 288. The defendant's title to the real estate in dispute depends upon the validity of the sale under the alias testatum fieri facias. If the sheriff's deed is conclusive of the regularity of the proceedings on which the sale was made, a statutory lien on the real estate was created which, being within four months of the filing of the petition in bankruptcy, is invalidated by the bankrupt act. If, by reason of the failure to record the writ in Chester county, no lien was created under the act of 1836, a common-law lien was incidental to the seizure of the real estate under the execution, and was likewise avoided by the statute. In either event, therefore, the lien on the real estate of Rosenberg in Chester county, sold on this writ, was obtained through the legal proceedings against him on the alias testatum fieri facias, and being within four months of the filing of the petition in bankruptcy was void, and the sale did not divest the title of

the bankrupt unless it had passed to a purchaser protected by the proviso to the clause of the act of Congress under consideration.

The effect of section 67 (f) of the bankrupt act being to avoid the lien on the real estate and to invalidate the sale made through legal proceedings thereon, it is therefore incumbent on Mrs. Rosenberg, if she desires to give validity to her ¹⁴¹ title, to show that she is within the proviso to the clause which protects a bona fide purchaser for value who acquires the real estate of a bankrupt without notice of his insolvency or reasonable cause of inquiry. This is a question of fact and necessarily for the decision of a jury. It follows that the trial judge should have affirmed the plaintiff's first point, and should have submitted to the jury to determine whether Mrs. Rosenberg acquired the real estate at the sheriff's sale without notice of her husband's insolvency or reasonable cause of inquiry.

We are of opinion that section 67 (f) of the national bankruptcy act of 1898 is applicable to cases of voluntary bankruptcy, and that the lien created by a writ of testatum fieri facias in Pennsylvania is within the meaning of the terms of clause (f) of this section of the act. There was, therefore, error in not submitting to the jury the question of Mrs. Rosenberg's knowledge of her husband's insolvency at the time she purchased his real estate at sheriff's sale.

The ninth assignment of error is sustained, the judgment is reversed, and a venire facias de novo is awarded.

Sheriff's Deed.—In support of a sheriff's deed, it must be presumed that all prior proceedings touching the sale, up to the execution of the deed, were regular and sufficient: *Hill v. Reynolds*, 93 Me. 25, 74 Am. St. Rep. 329, 44 Atl. 135; *Smith v. Crosby*, 86 Tex. 15, 40 Am. St. Rep. 818, 23 S. W. 10. Where the law requires the deed to be acknowledged in open court, it must be presumed that the court, in taking and certifying the acknowledgment, acted rightly and in accordance with its own rules: *Media Title and Trust Co. v. Kelly*, 185 Pa. St. 131, 64 Am. St. Rep. 618, 39 Atl. 832.

Bankruptcy.—As to the effect of bankruptcy proceedings on prior liens, see *Frazee v. Nelson*, 179 Mass. 456, 88 Am. St. Rep. 391, 61 N. E. 40; *Stickney etc. Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408, 49 Atl. 1039.

PHILADELPHIA BALL CLUB v. LAJOIE.

[202 Pa. St. 210, 51 Atl. 973.]

INJUNCTION Against Breach of Contract for Personal Services.—If one person agrees to render personal services to another which require and presuppose a special knowledge, skill, and ability in the employé, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of a court of equity, its performance will be negatively enforced by enjoining its breach. The damages for the breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same services in the labor market, and proof of impossibility of obtaining equivalent service is not a prerequisite to relief. This rule is here applied to a contract for services by a baseball player. (pp. 628, 629.)

INJUNCTION Against Breach of Contract.—If, owing to special features, a contract involves peculiar convenience or advantages, or where the loss would be a matter of uncertainty, the breach thereof may be deemed to cause irreparable injury, and may, therefore, be enjoined. (p. 629.)

CONTRACTS.—Mutuality of Remedy does not require that each party should have precisely the same remedy, either in form, effect or extent, and mere difference in the rights stipulated for does not destroy mutuality of remedy. In a fair and reasonable contract, it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon to constitute mutuality of remedy. (p. 632.)

INJUNCTION Against Breach of Contract for Personal Services.—If the negative remedy of injunction against a breach of contract will do substantial justice between the parties by obliging the employé either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. (p. 633.)

INJUNCTION Against Breach of Contract for Personal Services.—Mutuality of Remedy.—A contract of employment of a baseball player for a season, giving the employer a right of renewal of the contract for three succeeding seasons by notice given before the close of each season, and providing for the termination of the contract on ten days' notice, and that the employé may be enjoined from playing with another during the continuance of the contract, these provisions being declared part of the consideration for the contract to pay the stipulated salary, is not wanting in mutuality of remedy, or unreasonable so as to prevent enjoining the breach of the contract, it having been in part performed, and the employer being desirous of its continuance. (p. 633.)

J. I. Rogers and J. G. Johnson, for the appellant.

R. C. Dale and W. J. Turner, for the appellee.

215 POTTER, J. The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He

violated his agreement, however, during the term of his engagement, and in disregard of his contract, arranged to play for another and a rival organization.

The plaintiff, by means of this bill, sought to restrain him, during the period covered by the contract.

The court below refused an injunction, holding that to warrant the interference prayed for, "the defendant's services must be unique, extraordinary and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the court, the defendant's qualifications did not measure up to this high standard. The trial court was also of opinion that the contract was lacking in mutuality, for the reason that it gave plaintiff an option to discharge defendant on ten ²¹⁶ days' notice, without a reciprocal right on the part of defendant.

The learned judge who filed the opinion in the court below, with great industry and painstaking care, collected and reviewed the English and American decisions bearing upon the question involved, and makes apparent the wide divergence of opinion which has prevailed.

We think, however, that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him, he has taken extreme ground.

It seems to us that a more just and equitable rule is laid down in *Pomeroy on Specific Performance*, page 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employé, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. . . . The damages for breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same service in the labor market."

We have not found any case going to the length of requiring, as a condition of relief, proof of the impossibility of obtaining equivalent service. It is true that the injury must be irreparable, but as observed by Mr. Justice Lowrie, in *Commonwealth v. Pittsburg etc. R. R. Co.*, 24 Pa. St. 160, 62 Am. Dec. 372: "The argument that there is no 'irreparable damage' would not be so often used by wrongdoers if they would take the trouble to discover that the word 'irreparable' is a very

unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurate standard."

We are therefore within the term whenever it is shown that no certain pecuniary standard exists for the measurement of the damages. This principle is applied in *Vail v. Osburn*, 174 Pa. St. 580, 34 Atl. 315. That case is authority for the proposition that a court of equity will act where nothing can answer the justice of the case but the performance of the contract in specie; and ²¹⁷ this even where the subject of the contract is what under ordinary circumstances would be only an article of merchandise. In such a case, when, owing to special features, the contract involves peculiar convenience or advantage, or where the loss would be a matter of uncertainty, then the breach may be deemed to cause irreparable injury.

The court below finds from the testimony that "the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the team would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game."

We think that in thus stating it he puts it very mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. He has been for several years in the service of the plaintiff club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of the other players in the club, and his own work is peculiarly meritorious as an integral part of the team work which is so essential. In addition to these features which render his services of peculiar and special value to the plaintiff, and not easily replaced, Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright, particular star.

We feel, therefore, that the evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution, that their loss will produce irreparable injury, in the legal significance of that term, to the

plaintiff. The action of the defendant in violating his contract is a breach of good faith, for which there would be no adequate redress at law, and the case therefore properly calls for the aid of equity, in negatively enforcing the performance of the contract, by enjoining against its breach.

But the court below was also of the opinion that the contract **218** was lacking in mutuality of remedy, and considered that as a controlling reason for the refusal of an injunction. The opinion quotes the nineteenth paragraph of the contract, which gives to the plaintiff a right of renewal for the period of six months beginning April 15, 1901, and for a similar period in two successive years thereafter. The seventeenth paragraph also provides for the termination of the contract upon ten days' notice by the plaintiff. But the eighteenth paragraph is also of importance, and should not be overlooked. It provides as follows: "18. In consideration of the faithful performance of the conditions, covenants, undertakings and promises herein by the said party of the second part, inclusive of the concession of the options of release and renewals prescribed in the seventeenth and nineteenth paragraphs, the said party of the first part, for itself and its assigns, hereby agrees to pay to him for his services for said term the sum of two thousand four hundred dollars, payable as follows," etc.

And turning to the fifth paragraph, we find that it provides expressly for proceedings, either in law or equity, "to enforce the specific performance by the said party of the second part, or to enjoin said party of the second part from performing services for any other person or organization during the period of service herein contracted for. And nothing herein contained shall be construed to prevent such remedy in the courts in case of any breach of this agreement by said party of the second part, as said party of the first part, or its assigns, may elect to invoke."

We have, then, at the outset the fact that the paragraphs now criticised and relied upon in defense were deliberately accepted by the defendant, and that such acceptance was made part of the inducement for the plaintiff to enter into the contract. We have the further fact that the contract has been partially executed by services rendered, and payment made therefor; so that the situation is not now the same as when the contract was wholly executory. The relation between the parties has been so far changed, as to give to the plaintiff an equity arising out of the part performance, to insist upon the completion of the agreement according to its terms by the defendant. This

equity may be distinguished from the original right under the contract itself, and it might well be questioned whether the ²¹⁹ court would not be justified in giving effect to it by injunction, without regard to the mutuality or nonmutuality in the original contract. The plaintiff has so far performed its part of the contract in entire good faith, in every detail; and it would therefore be inequitable to permit the defendant to withdraw from the agreement at this late day.

The term "mutuality," or "lack of mutuality," does not always convey a clear and definite meaning. As was said in *Grove v. Hodges*, 55 Pa. St. 516: "The legal principle that contracts must be mutual does not mean that in every case each party must have the same remedy for a breach by the other."

In the contract now before us, the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. Upon the other hand, the plaintiff retained the right to terminate the contract upon ten days' notice, and the payment of salary for that time, and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as part of the consideration for the large salary paid to the defendant, and is emphasized as such. And owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable. Particularly is this true when it is remembered that the plaintiff has played for years under substantially the same regulations.

We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all the rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, so long as the bounds of reasonableness and fairness are not transgressed.

If the doctrine laid down in *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265, quoted in the opinion, is to prevail, it would seem that the power of the plaintiff to terminate the contract upon short notice ²²⁰ destroys the mutu-

ality of the remedy. But we are not satisfied with the reasoning intended to support that conclusion. We cannot agree that mutuality of remedy requires that each party should have precisely the same remedy, either in form, effect or extent. In a fair and reasonable contract, it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon.

It is true also that the case of *Rutland Marble Co. v. Ripley*, 10 Wall. 339, also quoted in the opinion, while not turning exclusively upon that point, seems to hold that a contract in which the plaintiff has an option to terminate it in a year cannot be enforced in equity on account of lack of mutuality; but in *Singer Sewing Machine Co. v. Union Buttonhole etc. Co.*, Holmes' Rep. 253, Fed. Cas. No. 12,904, Judge Lowell says, with reference to that case: "I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and circumstances of the business."

This judgment seems to be borne out, for in a later case, that of *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. Rep. 990, where the plaintiff had a right to terminate the contract for telegraphic service at the end of any year, while the defendant's obligation continued as long as the plaintiff chose to pay the yearly price for the services, the doctrine that such conditions constituted lack of mutuality does not seem to have been recognized.

In *Singer Sewing Machine Co. v. Union Buttonhole etc. Co.*, Holmes' Rep. 253, Fed. Cas. No. 12,904, which was a case where an injunction was allowed against the defendant, although the plaintiff had the right to terminate the contract, Judge Lowell in the course of a strongly reasoned opinion says: "In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable."

²²¹ On page 258, he says: "I think the fair result of the later cases may be thus expressed. If the case is one in which a negative remedy of injunction will do substantial justice be-

tween the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

The case now before us comes easily within the rule as above stated. The defendant sold to the plaintiff for a valuable consideration the exclusive right to his professional services for a stipulated period, unless sooner surrendered by the plaintiff, which could only be after due and reasonable notice and payment of salary and expenses until the expiration. Why should not a court of equity protect such an agreement until it is terminated? The court cannot compel the defendant to play for the plaintiff, but it can restrain him from playing for another club in violation of his agreement. No reason is given why this should not be done, except that presented by the argument that the right given to the plaintiff to terminate the contract upon ten days' notice destroys the mutuality of the remedy. But to this it may be answered that, as already stated, the defendant has the possibility of enforcing all the rights for which he stipulated in the agreement, which is all that he can reasonably ask; furthermore, owing to the peculiar nature and circumstances of the business, the reservation upon the part of the plaintiff to terminate upon short notice does not make the whole contract inequitable.

In this connection another observation may be made, which is that the plaintiff, by the act of bringing this suit, has disavowed any intention of exercising the right to terminate the contract on its own part. This is a necessary inference from its action in asking the court to exercise its equity power to enforce the agreement made by the defendant not to give his services to any other club. Besides, the remedy by injunction is elastic and adaptable, and is wholly within the control of the court. If granted now, it can be easily dissolved whenever a change in the circumstances or in the attitude of the plaintiff should seem to require it. The granting or refusal of an injunction ²²² or its continuance is never a matter of strict right, but is always a question of discretion to be determined by the court in view of the particular circumstances.

Upon a careful consideration of the whole case, we are of opinion that the provisions of the contract are reasonable, and that the consideration is fully adequate. The evidence shows

no indications of any attempt at overreaching or unfairness. Substantial justice between the parties requires that the court should restrain the defendant from playing for any other club during the term of his contract with the plaintiff.

The bill as filed contemplated only the services of defendant for the season of 1901, but it is stated in the argument of counsel that since the hearing in the court below, and prior to the argument in this court, the plaintiff by due notice renewed the current contract for the season of 1902.

The specifications of error are sustained, and the decree of the court below is reversed, and the bill is reinstated. And it is ordered that the record be remitted to the court below for further proceedings in accordance with this opinion.

INJUNCTION TO PREVENT BREACH OF CONTRACT.

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I. General Principles.

Injunctions to restrain breaches of negative covenants in contracts and mandatory injunctions to compel the observance of affirmative covenants therein are generally granted only when the threatened breach of an existing contract is clearly shown and when the recovery of damages at law would inadequately redress the impending injury: *Chicago etc. Ry. Co. v. New York etc. R. R. Co.*, 24 Fed. 516. As was said in *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 347, 26 Atl. 398: "The universal test of the jurisdiction of a court of equity to restrain the breach of a contract is the inadequacy of the legal remedy of damages. An injunction to prevent the breach of a contract is a negative specific performance

of that contract. And the jurisdiction of equity to grant such an injunction is substantially coincident with its jurisdiction to compel a specific performance by an affirmative decree. In either case, a court of equity cannot exercise jurisdiction, unless the injury apprehended from a violation of the contract is of such a nature as not to be susceptible of adequate damages at law." The jurisdiction of equity to enjoin the breach of a contract is substantially coincident with its jurisdiction to compel specific performance, as enjoining a breach of contract is a negative specific enforcement of its terms, and, generally speaking, if a contract may be affirmatively specifically enforced by either party, it may be negatively enforced by injunction restraining its breach, if injunction is the only practical mode of enforcement under its terms, and the remedy at law is inadequate: *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723, affirming the same case, 64 Ill. App. 285. In no case will an injunction issue to restrain the breach of a contract when the complaint shows the damage to be susceptible of computation and recompense in money: *Close v. Flesher*, 8 Misc. Rep. 299, 28 N. Y. Supp. 737. In cases where an injunction is asked against the breach of a contract the adequacy of the consideration for such contract will not be inquired into: *Guerand v. Dandele*, 32 Md. 561, 3 Am. Rep. 164. Breach of a contract will not be enjoined on the ground of the insolvency of the party thereto who is the wrongdoer, and especially when, in such case, the injury may be fully compensated in an action at law for damages: *Dills v. Doebl*, 62 Conn. 366, 36 Am. St. Rep. 345, 26 Atl. 398; *Gaslight etc. Co. v. New Albany*, 139 Ind. 660, 39 N. E. 462. An injunction will lie to restrain acts in violation of an existing lawful contract, though it is terminable at the option of one of the parties only, unless the reservation of such option makes the whole contract inequitable: *Singer Sewing Machine Co. v. Union Buttonhole etc. Co.*, 1 Holmes, 253, Fed. Cas. No. 12,904. If one of the parties has performed his part of the contract, an injunction may issue to restrain the other party from violating it, and in such case it is not necessary that the contract should have been actually violated. It is sufficient if the danger of its violation is imminent or actually impending: *Cases v. Holmes*, 10 Ala. 776; *Rock Island etc. Ry. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291. The fact that the contract provides that "in case of any differences they shall be settled by arbitration" does not oust jurisdiction to prevent the breach of the contract by injunction: *Richardson v. Emmert*, 44 Kan. 262, 24 Pac. 478.

It seems that an injunction may be granted to restrain acts in violation of a lawful contract, although the nature of the contract is such that specific performance cannot be enforced: *Singer Sewing Machine Co. v. Union Buttonhole etc. Co.*, 1 Holmes, 253; *McConnell v. Arkansas Brick etc. Co. (Ark.)*, 69 S. W. 559; *Western Union Tel. Co. v. Union Pacific Ry. Co.*, 3 Fed. Rep. 423; *Chicago etc. Ry. Co. v. New York etc. R. R. Co.*, 24 Fed. 516; *Chouteau v.*

Union Ry. etc. Co., 22 Mo. App. 287; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749, 51 N. E. 408. Equity will not interfere to prevent the breach of a continuing contract which is so uncertain and indefinite in its terms as to make it necessary to resort to conflicting evidence aliunde to determine the intent and rights of the parties. Nor will the injunction lie when the rights of the parties are doubtful: *Olin v. Bate*, 98 Ill. 53, 38 Am. Rep. 78; *Gaslight etc. Co. v. New Albany*, 139 Ind. 660, 39 N. E. 462; *Caswell v. Gibbs*, 33 Mich. 331; *Chouteau v. Union Ry. etc. Co.*, 22 Mo. App. 286; *Appeal of Brown*, 62 Pa. St. 17.

A contract cannot be specifically enforced, either affirmatively or negatively, in the absence of mutuality in its terms and requirements: *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723. What constitutes such mutuality is, however, a question about which there is very much legal dispute. This is shown by the principal case and cases hereafter cited under the head of "Breach of Contracts for Personal Services." In some states it is not essential that the injury threatened by the breach of the contract shall be irreparable, to warrant a resort to an injunction, nor that the defendant should be insolvent, and the fact that under the contract continuous duties arise does not prevent the aid of an injunction, although in a given case specific performance cannot be decreed. It is only essential that an adequate remedy at law is not afforded by an action for damages: *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 49; *Horsky v. Helena Consolidated Water Co.*, 13 Mont. 229, 33 Pac. 689.

II. Exclusive Privileges.

The breach of a contract granting an exclusive privilege may be enjoined whenever the remedy at law is not adequate, full, and complete. Thus, if a hotel-keeper makes a contract giving another the exclusive right to have and operate a telegraph office in such hotel during a certain season with the same right for each succeeding season, unless written notice to the contrary is given, and no such notice is given, the hotel-keeper may be enjoined from allowing a rival telegraph company to operate a competing office in the same hotel during any season it is occupied by the company to whom such exclusive privilege is given: *Western Union Tel. Co. v. Rogers*, 42 N. J. Eq. 311, 11 Atl. 13. If by contract a person is granted the exclusive right by a city for a term of years of having and removing the carcasses of all dead animals not slain for food, and such contract provides that it shall "be the duty of the keeper of the pound to notify the plaintiff to remove the animals destroyed by him," the plaintiff is entitled to an injunction restraining the pound-keeper from delivering, or causing to be delivered, to any other person than plaintiff such carcasses during the existence of the contract: *Alpers v. City of San Francisco*, 32 Fed. 503. And the same rule applies where one has contracted for the exclusive privilege of taking all blood from animals killed at certain slaughter-houses:

Manhattan Mfg. Co. v. New Jersey Stock Yard etc. Co., 23 N. J. Eq. 161. Breach of a contract for the exclusive privilege to put up and display in front of a theater stage an advertising drop-curtain may be enjoined if none of the advertisements are objectionable, as the remedy by action at law would be inadequate: *Beer v. Canary*, 2 App. Div. 518, 38 N. Y. Supp. 23. Upon the same principle an injunction will lie to restrain the breach of a contract whereby one person agrees to manufacture for another exclusively a certain article of merchandise known as a sideboard of a certain character, according to a special and unique design: *Lowenbein v. Fuldner*, 2 Misc. Rep. 176, 21 N. Y. Supp. 615.

Whenever it appears that the plaintiff may have an adequate remedy at law in the recovery of damage, an injunction will not lie to restrain the breach of an agreement contracting for an exclusive right or privilege. Thus, a contract whereby a person agrees to use a certain kind of hotel registers in his business, to the exclusion of all other kinds for a certain term of years, is not of such character that the breach thereof may be enjoined as the remedy at law is adequate: *Hair Co. v. Huckins*, 56 Fed. 366. Nor will the breach of a contract whereby defendant agreed to have her whole crop of sugar refined at a certain refinery for a certain term of years be enjoined: *Burden Central Sugar Refinery Co. v. Leverich*, 37 Fed. 67. Nor will the breach of a contract for the transportation of mail exclusively over the road of one company be enjoined, unless it is shown by the bill that a court of law cannot grant compensation in damages: *Powell v. Central Plank Road Co.*, 24 Ala. 441. It has been held that the breach of a contract for the exclusive privilege of receiving and using associated press despatches at a certain place cannot be enjoined: *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449.

A contract whereby a railroad company grants to a telegraph company a right of way along its road for a telegraph line, and agrees that it will not grant such right for the construction of any other telegraph line, does not vest in the company holding such contract such exclusive interest in the railroad's right of way for telegraph purposes as entitles it to an injunction against the construction of another telegraph line thereon: *Pacific Postal Co. v. Western Union Tel. Co.*, 50 Fed. 493.

III. Contracts in Restraint of Trade.

Contracts in reasonable restraint of trade are valid, and their violation may be restrained by injunction: *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Beard v. Dennis*, 6 Ind. 200, 63 Am. Dec. 380; *Guerand v. Dandeleit*, 32 Md. 561, 3 Am. Rep. 164.

Such contracts in restraint of trade as are valid may be enforced in equity, like other contracts, and breaches of them will be restrained by injunction, on the ground that no other remedy is adequate. Thus, contracts generally entered into upon the sale of a business or independently of such sale, not to enter or engage in

a certain kind of business or vocation in a certain locality for a limited time thereafter are valid, and their violation may be restrained by injunction: *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Spier v. Lambdin*, 45 Ga. 319; *O'Neal v. Hines*, 145 Ind. 32, 43 N. E. 946; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Augier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Dwight v. Hamilton*, 113 Mass. 175; *Grow v. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404; *Shearman v. Hart*, 14 Abb. Pr. 358; *Mackinnon Pen Co. v. Fountain Ink Co.*, 16 Jones & S. 442; *Davies v. Racer*, 72 Hun, 43, 25 N. Y. Supp. 293; *United States Cordage Co. v. Wall's Sons Rope Co.*, 90 Hun, 429, 35 N. Y. Supp. 978; *Niles v. Fenn*, 12 Misc. Rep. 470, 33 N. Y. Supp. 857; *Cowan v. Fairbrother*, 118 N. C. 406, 54 Am. St. Rep. 733, 24 S. E. 212. Injunction is the effective remedy for breach of a contract by which one person agrees not to engage in business in competition with another at a particular place for an unlimited time, if the contract does not fix any amount that shall be recoverable for its breach: *Jackson v. Byrnes*, 103 Tenn. 698, 54 S. W. 984. Equity will restrain the violation of an agreement by outgoing partners not to impair or injure the goodwill of the business transferred by them to the remaining partner, on the ground of the inadequacy of the legal remedies, and to prevent a multiplicity of suits: *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748.

A contract between landlord and tenant by which the tenant agrees to sell no other beer upon the premises than that manufactured by a certain brewing company, is valid, and not an unreasonable restraint upon trade, and its violation may be enjoined by the brewing company for whose benefit it was made, though it was not a party thereto: *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701. Or if by the terms of a contract one of the parties agrees that he will not sell, or allow others to sell, on his premises any but a specific make of patterns during the continuance of the contract, an injunction will issue to prevent a violation of the contract: *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68 Am. St. Rep. 749, 51 N. E. 408. Equity has jurisdiction of a personal negative covenant to manufacture a certain article of merchandise for a certain time and will enforce the performance of such covenant by injunction: *Bailey v. Collins*, 59 N. H. 459. The violation of an agreement by an employé with his employer not to engage, within a specified period after the termination of his employment, in business within a certain territory in competition with such employer, may be restrained by injunction, although his services are neither unique, special or extraordinary: *Reynolds Co. v. Dreyer*, 12 Misc. Rep. 368, 33 N. Y. Supp. 649. If an employé in possession of trade secrets and processes, stipulates in a contract of employment not to engage in or become interested in a competing business within a certain territory within a certain time, he may be enjoined from entering the employment of a rival concern, during the continuance of the term of the contract containing such

stipulation: *Harrison v. Glucose Sugar Refining Co.*, 16 Fed. 304.

If a person, under agreement not to carry on a specified business, under color of another name engages in a business which is within the spirit of the agreement, it is the better rule that he may be restrained from continuing it: *Cobbs v. Niblo*, 6 Ill. App. 60; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Richardson v. Peacock*, 26 N. J. Eq. 40; as he will not be allowed to do indirectly what he would not be allowed to do directly. But it has been held that if a wife sells her business and agrees not to enter such business again in a certain town, the contract is not binding on her husband, who is not a party thereto, so that he may be enjoined from entering the same business in the same town in his own name: *Emmert v. Richardson*, 44 Kan. 268, 24 Pac. 480; and that if a mother sells her business under the same conditions, and afterward establishes her son in the same business in the same place in his own name, the mother cannot be enjoined from permitting or aiding her son to carry on the business: *Harkinson's Appeal*, 78 Pa. St. 196, 21 Am. Rep. 9. It has also been held that a contract not to practice dentistry, in person or by agents, within certain limits is not violated so as to justify an injunction by working for another professionally: *Bowers v. Whittle*, 63 N. H. 147, 56 Am. Rep. 499.

a. Physicians.—Contracts of professional men, such as physicians, not to practice their profession in competition with others pursuing the same calling in a particular place or vicinity for a time designated, are valid, and an injunction may issue to compel them to comply with their agreement and not to practice their profession in a designated place or neighborhood: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Timmerman v. Dever*, 52 Mich. 34, 50 Am. Rep. 240, 17 N. W. 230; *French v. Parker*, 16 R. I. 219, 27 Am. St. Rep. 733, 14 Atl. 870; *Butler v. Burleson*, 16 Vt. 176. As in such cases there is an utter uncertainty in any calculation of damages from the breach of the contract, and the measure of damages is largely conjectural, equity will interfere to prevent a breach of the agreement because of the inadequacy of the remedy at law: *Wilkinson v. Colley*, 164 Pa. St. 35, 30 Atl. 286. If a breach of the contract is likely to cause the plaintiff damage, the defendant being insolvent, this makes a case for injunctive relief, the plaintiff having no other remedy: *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737; but an injunction may be granted without alleging the insolvency of the defendant, or averring or proving that the wrong is irreparable: *Gorden v. Mansfield*, 84 Mo. App. 367. The adequacy of the consideration of the contract not to engage in the practice of medicine within a specified territory will not be inquired into in an action for an injunction against the obligor, but it is sufficient if some legal consideration appears: *McCurry v. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 18 South. 806; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *McClurg's Appeal*, 58 Pa. St. 51. In *Thayer v. Younge*, 86 Ind. 259, it was held that in an action by one physician

against another to enforce by injunction an agreement by the latter to keep out of the practice of medicine, the court would decline to interfere when the disproportion between the consideration for the contract and the restriction is such as to make the agreement hard and oppressive. This case has, however, been overruled in effect by *Pickett v. Green*, 120 Ind. 584, 22 N. E. 737, and *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590.

b. Other Professions.—The rules applied to physicians are equally applicable to other professional men. Thus, a contract not to engage in the practice of law in a particular town is valid, and its breach may be restrained by injunction: *Smalley v. Greene*, 52 Iowa, 241, 35 Am. Rep. 267, 3 N. W. 78. A similar contract by a dentist may be enforced by enjoining its breach: *Cook v. Johnson*, 47 Conn. 175, 35 Am. Rep. 64; or one made by a druggist: *Baker v. Cordon*, 86 N. C. 116, 41 Am. Rep. 448; or by a dressmaker: *Morgan v. Perhamus*, 36 Ohio St. 517, 38 Am. Rep. 607; or by an innkeeper: *Stines v. Dorman*, 25 Ohio St. 580; or a photographer: *Dean v. Emerson*, 102 Mass. 480; or schoolteacher: *Spier v. Lambdin*, 45 Ga. 319; or undertaker: *Hall's Appeal*, 60 Pa. St. 458, 100 Am. Dec. 584.

IV. Breach of Covenant.

a. Use of Premises.—An owner of lands in making a sale and conveyance of them may by covenant in the deed impose restrictions upon their use by the purchaser or his assigns, deemed injurious to the use or value of the vendor's adjoining lands, and when such restrictions are not in general restraint of trade, or otherwise illegal, they follow the lands in the hands of subsequent purchasers with notice, and a court of equity will enforce by injunction as against the vendee, or his grantee with notice, such covenant restricting the use of the lands. This jurisdiction is not dependent upon a showing of consideration or of actual damages, or of the insolvency of the defendant: *Webb v. Robbins*, 77 Ala. 177; *Star Brewing Co. v. Primas*, 163 Ill. 652, 45 N. E. 145; *Hovnanian v. Bedessern*, 63 Ill. App. 353; *Lattimer v. Livermore*, 72 N. Y. 174; *Walker v. McNulty*, 19 Misc. Rep. 701, 45 N. Y. Supp. 42. If all of the purchasers of an estate are bound by restrictive covenants not to use their property for certain purposes, an injunction will be granted to restrain a breach of such covenant, without regard to the question of the character or degree of annoyance caused by the breach: *Hall v. Wesster*, 7 Mo. App. 56. Mutual covenants against carrying on a business offensive to neighbors on the premises conveyed, inserted in all the deeds made by the owner of a tract of land to successive purchasers of different lots in such tract, are intended to secure each purchaser against an offensive use of other lots in the same tract, and a purchaser of one of such lots may enjoin a purchaser of another lot from carrying on an offensive business thereon—such as a coalyard: *Barrow v. Richard*, 8 Paige, 351, 35 Am. Dec. 713, 3 Edw. Ch. 102; or blasting or breaking stone for

sale and profit: *Haskell v. Wright*, 23 N. J. Eq. 389; or the erection of a wharf: *Seymour v. McDonald*, 4 Sand. 535; or of a church: *St. Andrew's Church's Appeal*, 67 Pa. St. 512. A covenant in a deed whereby the grantee agrees for himself, his heirs, and assigns, that the premises conveyed shall not be used or occupied as a hotel, so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may in equity be enforced by injunction: *Stines v. Dorman*, 25 Ohio St. 580. A covenant in a deed that an alleyway or street shall always remain open to the purchaser may be enforced by injunction against the vendor if he attempts to close it up: *Trueheart v. Price*, 2 Munf. 468; *Brooke v. Barton*, 6 Munf. 306.

b. Building Restrictions.—If neighboring proprietors of lots are bound by a covenant in a deed under which both hold not to erect buildings within a prescribed distance from the street or a designated line upon which the lots abut, either is entitled to an injunction to enforce observance of the covenant by the other: *Gawtry v. Leland*, 31 N. J. Eq. 385; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Buck v. Adams*, 45 N. J. Eq. 552, 17 Atl. 961; *Maxwell v. East River Bank*, 3 Bosw. 124; *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr., N. S., 266; *McGuire v. Caskey*, 62 Ohio St. 419, 57 N. E. 53. A covenant in deeds to numerous grantees, subject to a uniform restriction that no buildings except dwelling-houses of a certain height set back a certain distance from the street shall be erected on the property conveyed, is of such nature as to justify an injunction against one of such owners who attempts to so alter his premises that they may be used for business purposes: *Hills v. Metzenroth*, 173 Mass. 423, 53 N. E. 890. Generally, a stipulation or covenant in a deed to a lot of land prohibiting the erection or use thereon of certain kinds of buildings, or the use of buildings for certain purposes, is enforceable by injunction: *Winnepesaukee Assn. v. Groton*, 63 N. H. 505, 3 Atl. 426; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400. Thus, under a covenant not to erect a building in a certain place, an injunction may be granted to restrain the covenants from erecting a fence which would have the same effect as a building: *Wright v. Evans*, 2 Abb. Pr., N. S., 308. If the purchaser of a city lot covenants against the erection of a livery-stable thereon, and the vendor covenants that he will erect no more than two houses on the residue of the land owned by him, the purchaser may enjoin the vendor from erecting a livery-stable on the residue of his property, as the word "house" in his covenant must be understood as meaning dwelling-house: *Schenck v. Campbell*, 11 Abb. Pr. 292.

It seems that covenants concerning building restrictions contained in deeds will not be enforced by injunction when the character of the locality has so changed that the purpose of such restrictions can no longer be accomplished. This is the rule maintained in *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 76, 31 N. E.

691, where the court said: "It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences, and that owing to the general growth of the city and the present use of the whole neighborhood for business, this purpose can be no longer accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions, and since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made."

Building restrictions may rest in agreement between owners and their grantees outside of covenants in their deeds, and an agreement between owners of adjoining lands concerning the occupation or character of buildings to be erected and the mode of use thereof, though not entered into in the form of a covenant or condition, or so framed as to be binding on heirs and assigns by virtue of privity of estate, may yet create a right in the nature of a servitude or easement, which a court of equity will enforce by injunction: *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Tallmadge v. East River Bank*, 2 Duer, 615, 26 N. Y. 105. The equity resulting from a valid agreement by the owner of land restricting the use thereof as to business or buildings, although not a covenant running with the land, or a legal exception or reservation out of it, but simply a personal contract, goes with the land into the hands of a purchaser from such owner, with notice, and such equity may be enforced by injunction: *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209. To warrant equitable relief in case of an infraction of such an agreement, it is not essential that any privity of estate should exist between the parties, nor is it an objection against the granting of an injunction that such agreement rests in parol: *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, 29 N. E. 81; *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209.

c. Sale of Liquor.—A restrictive clause in a deed providing that the grantee shall not use the conveyed premises for saloon purposes so long as the grantor retains ownership of the adjacent property, is a valid negative covenant, and equity will enjoin its breach by the grantee or his grantee with notice: *Star Brewing Co. v. Primas*, 163 Ill. 652, 45 N. E. 145. A condition or covenant in a deed that no intoxicating liquors shall ever be sold on the premises conveyed is valid, and an injunction may issue against its breach: *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104. A restriction in a deed against the sale of liquors on the premises conveyed is a covenant running with the land, and therefore effective against a tenant or

assignee of the vendee, who may be enjoined from violating such covenant: *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410. Specific performance of an ordinary agreement entered into by the purchasers of different parcels of real property, not to use it for the sale of intoxicating liquor, will be enforced against one of them, though some of the purchasers have sold their lots to grantees who are not bound by the agreement, if none of such grantees has in fact violated it: *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876. To prevent the enforcement of a restriction in a deed against the sale of liquor, there must be such a change in the character of the neighborhood, caused by the grantor, or those claiming under him as to defeat the purpose of the restriction, or to seriously injure the property rights of the grantee if enforced: *Star Brewing Co. v. Primas*, 163 Ill. 652, 45 N. E. 145.

V. Covenant in Leases.

a. **Use of Premises.**—If a lessee is, by the terms of his lease, restricted to a certain and particular use of the demised premises, equity will generally restrain him from any other use of them, even though no irreparable injury is shown to result from the breach. The remedy at law is deemed inadequate: *Bryden v. Northrup*, 58 Ill. App. 233; *Thurston v. Ninke*, 32 Md. 487; *Engle v. Thorn*, 3 Duer, 15; *Dodge v. Lambert*, 2 Bosw. 570; *Howard v. Ellis*, 4 Sand. 369; *Frank v. Brunnemann*, 8 W. Va. 462. In other words, if a lessee covenants for a particular use of the demised premises, equity will restrict him to that use by injunction. Covenants affecting the mode of occupation, use and enjoyment of the leased premises run with the land, and the assignee of the lease, though not named, may be restrained by injunction from violating the covenant: *Werthemier v. Circuit Judge*, 83 Mich. 56, 47 N. W. 47. And a covenant that the lessee or his assigns will not put the leased premises to a specified use may be enforced against a subtenant of the lessee by enjoining its breach, or both the tenant and the subtenant may be enjoined from violating the covenant: *Ambler v. Skinner*, 7 Robt. 561; *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241. It has been held, and we think correctly, that a right of re-entry reserved in a lease of real estate for breach of a covenant is not an adequate remedy so as to deprive the lessor of the right to an injunction to restrain such breach, even if such re-entry does not work a forfeiture of future rents, unless the lease also provides that the lessor shall not be held to account to the lessee for the possession after the re-entry: *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241. In New York, however, a different rule prevails, and it is there held that such breach of covenant is not ground for an injunction if the lease reserves a right of re-entry for the breach: *Trenor v. Jackson*, 15 Abb. Pr., N. S., 115; *Gillilan v. Norton*, 6 Rob. (N. Y.) 546.

A breach of a covenant in a lease not to underlet will be restrained by injunction, both as against the lessee and the under ten-

ant in possession: *Ambler v. Skinner*, 7 Rob. (N. Y.) 561; *Sloan v. Martin*, 22 Jones & S. 87. The lessor may, by injunction, prevent his lessee or those claiming or holding under him from converting the demised premises to uses inconsistent with the terms of the lease, and from making material alterations for such purposes, and committing other kinds of waste: *Maddox v. White*, 4 Md. 72, 59 Am. Dec. 67. If land is leased for a particular purpose with the right to erect a certain kind of building, the lessor is entitled to enjoin the lessee from erecting buildings for different purposes on the land in addition to those contemplated by the lease: *Kraft v. Welch*, 112 Iowa, 695, 84 N. W. 908. An injunction will lie to restrain a lessee under a natural gas lease from cutting off the supply of gas he has covenanted in his lease to furnish to lessor or his assigns, where great injury will result from cutting off the gas and there is no remedy at law: *Simpson v. Pittsburgh etc. Glass Co.*, 28 Ind. App. 343, 62 N. E. 753.

If a tenant covenants with his landlord that the latter shall have the right to go upon the leased premises during the continuance of the lease, and fall plow and sow any part of the premises proper to be thus cultivated, the tenant may be enjoined from preventing the lessor's entering upon, plowing and sowing a stubble field, when it is shown that the injury from such deprivation would be irreparable, and that there is no adequate remedy at law: *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543. An injunction will lie to prevent the lessee of a railroad from ceasing to operate it during his lease when he covenants to maintain and operate the road during the whole term of the lease, as the remedy at law is neither complete nor adequate: *Southern Ry. Co. v. Franklin etc. R. R. Co.*, 96 Va. 693, 32 S. E. 485.

b. Breach by Landlord.—A tenant may seek the aid of a court of equity to prevent his landlord from breaking a covenant, the breach of which would work a forfeiture of his estate: *Rogers v. Danforth*, 9 N. J. Eq. 289. A tenant in possession under a lease by the terms of which the landlord is to furnish him power, the landlord may be enjoined from cutting off the power, although differences have arisen between the parties in regard to the payment of rent: *Traitel Marble Co. v. Chase*, 35 Misc. Rep. 233, 71 Am. St. Rep. 628. But a covenant in a lease by the lessor not to let other premises for the same purposes does not entitle the lessee to an injunction against subsequent lessees of such other premises restraining them from the enjoyment of their lease, they being neither parties nor privies to the lease containing such covenant: *Napa Valley Wine Co. v. Boston Block Co.*, 44 Minn. 130, 20 Am. St. Rep. 562, 46 N. W. 239. And if the lessor of a building has agreed with his contemplated tenant that a building shall be constructed according to certain plans, the tenant is not entitled to an injunction forbidding its construction according to different plans as equity will refuse to order specific performance of a contract

to build or repair: *Backes v. Curran*, 36 Misc. Rep. 492, 73 N. Y. Supp. 937.

VI. Stipulation for Damages.

It may be stated as the general and prevailing rule that if the parties to a contract stipulate for the payment of a specified sum in case of its breach, and such sum is truly liquidated damages, equity will not interfere by injunction to prevent such breach, though the party guilty thereof is insolvent, but will leave the party to his remedy at law for damages for the breach of the contract: *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 26 Atl. 398; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Hahn v. Concordia Society*, 42 Md. 460; *Mapleson v. Del Puente*, 13 Abb. N. C. 144; *Nessle v. Reese*, 19 Abb. Pr. 240, 29 How. Pr. 382; *Coe v. Columbus etc. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *McCaull v. Braham*, 16 Fed. 37. An injunction cannot issue, in an action for a breach of a covenant or agreement, to restrain the defendant from carrying on a certain trade or profession within a certain time, in a certain place, if a specified sum is named in the agreement as a penalty for its breach: *Dills v. Doeblor*, 62 Conn. 366, 36 Am. St. Rep. 345, 26 Atl. 398; *Vincent v. King*, 13 How. Pr. 234. Some courts refuse to follow this rule under similar conditions, and hold that the naming of a specified sum as a penalty for the breach of the contract does not necessarily oust the jurisdiction of equity to proceed and enjoin such breach: *Ropes v. Upton*, 125 Mass. 258; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 3 N. E. 419; *Reynolds v. Dreyer*, 12 Misc. Rep. 368, 33 N. Y. Supp. 649. Cases maintaining this rule place it upon the ground that a mere penalty designed solely to secure observance of a contract will not be construed as liquidated damages, nor as preventing an injunction. *McCaull v. Braham*, 16 Fed. 37. In *Ropes v. Upton*, 125 Mass. 260, the court said: "In determining the question whether the sum named is a penalty or liquidated damages, courts give but little weight to the mere form of words, but gather the intent from the general scope and purport of the contract; and as it is difficult to estimate damages arising from the breach of an agreement, the current of authorities is to treat the sum named as liquidated damages rather than a penalty. It is often stated that a court of equity will not interfere to prevent a party from doing an act which he has agreed not to do, when liquidated damages are provided in case he does the act. But this must be taken with some qualifications, for it must appear from the whole contract that the stipulated sum was to be paid in lieu of the strict performance of the agreement, and was an alternative which the party making the covenant had the right or option to adopt. . . . And if the substance of the agreement is that the party shall not do a particular act, and that is the evident object and purpose of the agreement, and it is provided that, if there is a breach of this agreement the party shall pay a stated sum, which does not clearly appear to be an alternative which he has the right

to adopt instead of performing his contract, there would seem to be no reason why a court of equity should not restrain him from doing the act, and thus carry out the intention of the parties. If such appears to be the purpose of the agreement, the fact that the sum to be paid is a stated or stipulated amount, in the nature of liquidated damages, should not oust a court of equity of jurisdiction to compel the party to carry out his agreement. In other words, naming a sum to be paid as liquidated damages does not, in itself, conclusively establish that the parties contemplated the right to do the act upon payment of the compensation, and make an alternative agreement for the benefit of the party who has done what he has agreed not to do": *Ropes v. Upton*, 125 Mass. 261.

VII. Both Parties in Fault.

Generally, an injunction will not be granted to prevent the violation of a contract when it appears that plaintiff is himself in default: *Loughery v. McAlvain*, 8 Phila. 278; *Clum v. Brewer*, Brunner Col. Cas. 635, Fed. Cas. No. 2910. If the parties to a contract are bound to perform concurrently the stipulations therein, and both are in default, neither can, in a court of equity, take advantage of the failure of the other. Hence, in such cases an injunction will not lie in favor of one party to prevent a breach of the contract by the other: *Reynolds v. Vance*, 4 Bibb. 213; *Appeal of Mints*, 128 Pa. St. 163, 18 Atl. 509; *Texas etc. Ry. Co. v. City of Baton Rouge*, 36 Fed. 845; *Pullman Palace Car Co. v. Missouri etc. Ry. Co.*, 55 Fed. 138. An injunction will not be granted to a grantor to restrain the grantee of a certain lot and others from drilling an oil or gas well thereon, in violation of a covenant in the deed from the grantor, if he has himself violated the covenant by drilling wells in the same addition in which the lot lies, and it is shown by the lot owners in such addition that the covenant was not intended as a reservation of the oil or gas, but as a restriction to be placed in all deeds of lots sold in the addition to secure them, as dwelling places, from the annoyance of oil or gas wells: *Appeal of Acheson*, 130 Pa. St. 633, 18 Atl. 873. If a mutual and reciprocal covenant is broken by one party, he cannot obtain aid of a court of equity to restrain the other covenantor from its violation: *Clum v. Brewer*, Brunner Col. Cas. 635, Fed. Cas. No. 2910.

VIII. Contracts for Personal Services.

a. **The General Rule** is that a contract for personal services cannot be specifically enforced, nor can this be done indirectly by an injunction restraining the employé from leaving the service in the absence of a negative stipulation not to perform services for another during the period of employment. "The rule, we think, is without exception that equity will not compel the actual affirmative performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter from what cause, is not acceptable to him for

service of that character. The right of an employé engaged to perform personal service to quit that service rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case, or the discharging in the other, is in violation of the contract between the parties, the one injured by the breach has his action for damages, and a court of equity will not, indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day, or the affirmative acceptance of merely personal services. Relief of that character has always been regarded as impracticable": *Arthur v. Oakes*, 63 Fed. 318; citing *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730-740.

These cases relate to railroad employés, and in effect overrule *Farmers' Loan etc. Co. v. Northern Pac. R. R. Co.*, 60 Fed. 803, holding that an injunction may issue to restrain the formation and execution of a conspiracy among railroad employés to quit the service in a body, with the design of crippling the property and operation of the road. It must be borne in mind, however, that so long as the employé remains in the service of the railroad company he may be required by injunction to perform his duty in assisting to operate its trains: *Southern Cal. Ry. Co. v. Rutherford*, 62 Fed. 796.

The earlier cases hold, without exception, that courts of equity cannot negatively enforce the specific performance of a contract for personal services by means of an injunction restraining its violation, and it has been said that "the difficulty, if not the utter impracticability, of compelling specific performance of such contract is a conclusive reason why this court should refuse its interference": *Sanquirico v. Benedetti*, 1 Barb. 315. This rule has been applied to actors and actresses, as in the last case cited, and in *Hamblin v. Dineford*, 2 Edw. Ch. 529. Thus, an injunction against an actor's performing at another theater during a season for which he has contracted to perform at the plaintiff's theater for a stipulated weekly salary, when there are no negative stipulations in the contract prohibiting the defendant from performing elsewhere, cannot be maintained, nor can another manager be enjoined from employing him: *Burton v. Marshall*, 4 Gill, 478, 45 Am. Dec. 171; *Butler v. Galletti*, 21 How. Pr. 465. And it has been held that an injunction will not issue to restrain the breach of a negative covenant in such agreement—namely, that the defendant will not make other engagements: *Sanquirico v. Benedetti*, 1 Barb. 315. The breach of such negative covenant cannot be enjoined in the absence of a showing that the performance of the act would produce irreparable damages to the plaintiff: *De Pol v. Sohlke*, 7 Rob. (N. Y.) 280.

In case of a breach of contract to give a sparring exhibition on a specified day, or a day to which it may be mutually postponed, and not to give such exhibition at any other place until after the contract with plaintiff had been fulfilled, equity will not, after the specified day, enjoin the exhibitors from giving exhibitions at other places until the contract is performed, although such exhibitors failed

to appear on the day named. The reason given is that as the time of the performance of the contract after the day set depended upon the mutual agreement of the parties, the court would not grant the injunction, as that would enable plaintiff, by refusing to agree to a day for the exhibition to be given, to deprive the defendants indefinitely of their right to employ their talents to obtain a livelihood. In such case equity has no jurisdiction, and plaintiff must be remitted to his remedy in damages at law: *Arena Athletic Club v. McPartland*, 41 App. Div. (N. Y.) 352, 58 N. Y. Supp. 477.

b. Services Must be Special, Unique, or Extraordinary.—The courts in the later have receded somewhat from the conclusions reached in the earlier cases, and now maintained by an almost unbroken line of authority, that if a "contract stipulates for special, unique, or extraordinary personal services or acts, or where the services to be rendered are purely intellectual, or are peculiar and individual in their character, the court will grant an injunction in aid of specific performance" by restraining the breach of the negative covenant. But where the services are material or mechanical, or are not peculiar or individual, the party will be left to his action for damages. The reason seems to be that services of the former class are of such a nature as to preclude the possibility of giving the injured party adequate compensation in damages, while the loss of services of the latter class can be adequately compensated by an action for damages: *William Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467. In *Cort v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 22 Pac. 1054, the rule is again laid down, and it is there held that if services contracted for are unique and extraordinary, involving such special merit or qualification as to make them distinctly personal and peculiar, so that in case of default the same or like services could not be easily procured or compensated in damages, an injunction will issue to prevent a breach of the contract, although it contains no negative stipulation. But if such services are ordinary and without special merit, and such as can be readily supplied or obtained without difficulty or expense, the court will not interfere by injunction to prevent a breach of the contract.

While this is the prevailing rule, we doubt its soundness and stability, because of its indefiniteness. It fixes no standard by which to determine whether the services contracted for are unique and extraordinary, or material, mechanical and ordinary. The solution of this question is left wholly to the discretion of the court trying the case. Under exactly similar facts, one court may consider the services contracted for as extraordinary, while another court, of equal standing, may consider them as merely ordinary. In one case the injunction is granted. In the other it is denied. This is shown by the decision in the principal case, as compared with the decision in the case of *American Baseball etc. Co. v. Harper*, decided by the circuit court of St. Louis, May, 1902, reported in 54 Central Law

Journal, 449, both involving a contract containing the same stipulations and the same facts. Here the whole conflict is upon a pure question of fact, the Pennsylvania court holding in the principal case that Lajoie, as a star second baseman, had special and extraordinary qualifications in the work which he has agreed to do; while the St. Louis court held that Harper, a young and rising baseball pitcher of national reputation, has nothing but mechanical and ordinary ability. The one has a solemn judicial finding that he is a person of such attainments in his profession that his position cannot possibly be filled. The other is decreed to be simply an ordinary person, whose place can be easily filled, and whose absence from his post can result in no particular or irreparable injury. Lajoie's professional reputation is established and enhanced at the cost of his freedom, while Harper gets his freedom at the expense of his professional reputation. Any rule of law allowing an exactly opposite conclusion to be reached upon the same state of facts is certainly unsatisfactory and needs amendment and correction. The test applied, at least in one case, is, that the question whether the services contracted for are so unique and extraordinary as to require an injunction to restrain the person from serving another, may be answered by determining whether the services can be rendered by a substitute, and if the same service can be rendered by a substitute, although at some loss, it is not a proper case for an injunction: *Johnston Co. v. Hunt*, 66 Hun, 504, 21 N. Y. Supp. 314.

The doctrine that, unless personal services contracted to be rendered are individual and peculiar, because of their special merit or unique character, a negative covenant not to render them to others than the plaintiff will not be enforced by injunction in order that the plaintiff may have the incidental benefit of an affirmative covenant to serve him exclusively for a specified time, has been applied in a number of cases involving salesmen, actors, singers, artists, baseball players, and the like, and the relief prayed for has been denied on the ground that the services of the defendant were only ordinary and easily replaced, and that the law afforded an adequate remedy in damages: *Burney v. Ryle*, 91 Ga. 701, 17 S. E. 986; *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 432; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723; *Stemberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Carter v. Ferguson*, 58 Hun, 569, 12 N. Y. Supp. 580; *Universal Talking Machine Co. v. English*, 34 Misc. Rep. 342, 69 N. Y. Supp. 813; *Cork v. Lassard*, 18 Or. 221, 17 Am. St. Rep. 726, 22 Pac. 1054. In cases similar to the principal case involving the services of baseball players, it has been held that an injunction will not lie to restrain them from violating their contract to play exclusively for plaintiff for a designated period, though they be players of exceptional and peculiar skill, as such contract is merely one to render personal services, which, in case of the player's default, may be readily had from others, and adequate damages obtained for the breach: *Columbus B. B. Club v. Reiley*, 25 Week. Bull. 385. In such case the player

cannot be enjoined from playing with another club, nor can such other club be enjoined from employing him: *Harrisburg B. B. Club v. Athletic Assn.*, 8 Pa. Co. Ct. Rep. 337. The breach of a contract for the services of a baseball player containing a clause giving the plaintiff the "right to reserve" him for the next season cannot be enforced by injunction restraining the reserve clause: *Metropolitan Exhibition Co. v. Ward*, 24 Abb. N. C. 393, 9 N. Y. Supp. 779; *Metropolitan Exhibition Co. v. Ewing*, 42 Fed. 198, 24 Abb. N. C. 419. It has, however, also been held that if a baseball player of exceptional skill and ability has contracted for his personal services, and his place cannot be reasonably filled by another, and irreparable damage will result from his breach of contract, equity may enjoin him from such services to another during his term of employment to the plaintiff: *Columbus B. B. Club v. Reiley*, 11 Ohio Dec. 272.

There is a line of cases which maintain the doctrine that contracts for the exclusive services of distinguished artists in theatrical representations are personal and peculiar, and involve extraordinary ability, that damages for the violation of such contracts are not capable of definite determination, and that violations of them may properly be restrained by injunction: *McCaull v. Braham*, 16 Fed. 37; *Daly v. Smith*, 49 How. Pr. 150, 6 Jones & S. 158; *Canary v. Russell*, 9 Misc. Rep. 558, 30 N. Y. Supp. 122; *Fredericks v. Mayer*, 13 How. Pr. 566; *Mapleson v. Del Puente*, 13 Abb. N. C. 144. If an actor contracts to perform at plaintiff's theater at a fixed compensation for a certain time, and not to perform in another theater before the expiration of the contract, he may be restrained by injunction from carrying out an agreement to perform at another theater before the expiration of the first contract: *Hayes v. Willio*, 11 Abb. Pr., N. S., 167. So, an employé having special knowledge or skill, not readily obtainable, who refuses to render further services, may be enjoined from performing similar services for any other person, if his place can be easily supplied by the employment of another person: *Universal Talking Machine Co. v. English*, 34 Misc. Rep. 342, 69 N. Y. Supp. 813. An injunction will lie, it has been held, by an employer against an actor or actress who contracts to render him personal services, and during the time of such employment not to render them to any other person, to prevent the obligee from rendering services to any other person, when by so doing irreparable damage will be done to the employer, and the injunction will also lie, although the contract does not contain the negative clause: *Daly v. Smith*, 6 Jones & S. 158, 49 How. Pr. 150. In the case of *Duff v. Russell*, 14 N. Y. Supp. 134, 93 N. Y. St. Rep. 266, affirmed in 133 N. Y. 678, 31 N. E. 622, it appeared that the defendant, an actress and singer, had made a contract with the plaintiff, a theatrical manager, to appear in certain operas he was about to produce during a certain season. Defendant was distinguished in her profession, and a great artistic acquisition to any theater producing such operas. After the plaintiff, at great expense, had advertised the defendant as a member of his

company, and during such playing season she refused to perform in an opera produced by plaintiff, because she was for a short time during the performance required to appear in tights, which, she claimed, was injurious to her figure and health, and she, at that time, had agreed to appear at a rival theater to the end of the season, against the objection of the plaintiff. It appeared that it was impossible for plaintiff to replace the defendant by any other actress or singer of equal repute, and in consequence he was likely to, and in fact did, suffer irreparable damage. It was held that these facts were sufficient to entitle plaintiff to an injunction to restrain the defendant from appearing at a rival theater.

A stipulation in a contract of employment of an actor or actress for two theatrical seasons, each beginning in the fall of the year and ending the following June, that he or she will not perform under any other management during the continuance of the contract, does not authorize an injunction restraining him or her from performing under other management during the time between the ending of one season and the beginning of another: *Canary v. Russell*, 9 Misc. Rep. 558, 30 N. Y. Supp. 122.

IX. Violation by Employer.

An injunction will not lie to compel an employer to refrain from breaking his contract with his employé and to retain the latter in his service when he is not acceptable to him for service of that character. A court of equity will not by means of an injunction compel the affirmative acceptance by the employer of the personal services of his employé from day to day; besides the remedy of the employé at law for damages is adequate and complete: *Arthur v. Oakes*, 63 Fed. 310; *Bronk v. Riley*, 50 Hun, 489, 3 N. Y. Supp. 446. Equity will not enjoin a board of supervisors who have engaged the services of a person as overseer of a heating plant from dismissing such person from the employment, as the remedy at law is adequate: *Thomas v. Board of Supervisors*, 56 Ill. 351. An injunction will not lie to prevent a breach by the employer of a contract for personal services, such as the appointment of a person as sexton of a cemetery for a certain term: *Healy v. Allen*, 38 La. Ann. 867. Nor can such sexton prevent by injunction the appointment of his successor: *Healey v. Dillon*, 39 La. Ann. 503, 2 South, 49. Upon a bill in equity to restrain the defendant from removing the plaintiff as manager of the former's stock farm, which position, plaintiff claimed, he was by contract with defendant to have for five years, as a condition upon which he had bought a certain part of the stock, it was held that a preliminary injunction would be dissolved, one of the grounds therefor being that such a contract could not be enforced by injunction, or by a decree for specific performance: *Coburn v. Cedar Valley etc. Co.*, 25 Fed. 791.

X. Mutuality.

A contract cannot be specifically enforced, either affirmatively or negatively, by injunction, in the absence of mutuality in its terms

and requirements: *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27; *Welty v. Jacobs*, 171 Ill. 624, 49 N. E. 723; and there is direct authority to the effect that the right of one party to terminate a contract on notice to the other, while such other continues bound to perform and has no option or revocation, is so wanting in mutuality as to be nonenforceable in equity: *Marble Co. v. Ripley*, 10 Wall. 339; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720, 11 N. W. 265. Under these decisions it seems to us that the baseball contract involved in the principal case is fatally lacking in mutuality, and should not have been enforced. And in fact it was so ruled in the case of *American Baseball etc. Co. v. Harper*, decided by the circuit court of St. Louis, May, 1902, and reported in 54 Central Law Journal, 449. Both of these cases involved the same questions for decision, as both were actions to enforce the same form of contract entered into by baseball players, and both involved an attempt by such players to evade their contracts and play ball for a rival association. In the latter case, *American Baseball etc. Co. v. Harper*, the court held that an agreement for personal services under which the employé agrees to remain in the employment for a year, but with no stipulation by the employer that he shall remain employed for such time, but, on the contrary, the contract provides that the employer may terminate the contract by notice for a certain number of days, or for causes of which he is made the sole judge, absolutely lacks mutuality, and equity will not restrain the employé by injunction from breaking his contract and entering the service of a third person and rival association before the end of the term. It has also been decided by an inferior court in Pennsylvania, and prior to the decision in the principal case, that an agreement whereby a person agrees to play baseball for a club for a period which, at the option of the club, might equal the term of the player's life, and which reserves to such club the right to discharge the player upon ten days' notice, without cause, is not an agreement enforceable by an injunction against its violation by the player. The decision is placed upon the ground that such an agreement is unfair, and fatally wanting in mutuality: *Philadelphia Ball Club v. Hallman*, 8 Pa. Co. Ct. Rep. 57; *American Assn. Ball Club v. Pickett*, 8 Pa. Co. Ct. Rep. 232.

FURST v. ARMSTRONG.

[202 Pa. St. 348, 51 Atl. 996.]

EXECUTORS AND ADMINISTRATORS—Power to Carry on Business of Testator.—A testator may, by his will, empower his executor to carry on the business in which he is engaged at the time of his death, and when he does so he subjects the assets of his estate to debts contracted for that purpose. Whether liability for the trade debts of an executor extends to the entire estate, or is limited to a specific fund, depends upon the authority conferred upon the executor by the will. (p. 654.)

EXECUTORS AND ADMINISTRATORS—Power to Carry on Business of Testator.—If a testator, by will, gives his executor unlimited power to carry on his business after his death, without placing any limitation on or designating any specific fund to be used for that purpose, the executor may subject the general assets of the estate to liability for trade debts contracted by him, and is not limited to the capital invested in the business at the time of the testator's death, and if the widow of the testator does not elect to take against the will, her share of the estate is liable with the other assets for such trade debts. (pp. 656, 657.)

M. L. Mitchell, A. O. Furst, W. S. Furst, and W. D. Crocker, for the appellant.

S. T. McCormick, H. C. McCormick, and J. G. Reading, for the appellee.

354 MESTREZAT, J. The principal and controlling question in this case arises on the construction of the last clause of the fourth item of Levi Houston's will, which is as follows: "And I give to my said executor full power to conduct for such time as she may see fit the business in which I may be engaged at the time of my death." It is contended on the part of the appellants that the authority thus invested in the executrix was limited to the "business" of carrying on the planing-mill and the manufacturing of wood-working machinery, and did not empower the executrix to engage in farming and store keeping, and renting the testator's tenement houses as he had done prior to his death. It is further claimed by the appellants that the executrix could not, under the authority conferred upon her by the will, subject the general assets of the estate of the testator to liability for the grade debts contracted by her, but that she was limited to the capital invested in the business at the testator's death. On the other hand, the appellees contend, and the court below held, that all the assets of the testator's estate are liable for the debts contracted by the executrix in the conduct of his business under the power contained in the will.

At the time of the testator's death in 1892 he was the owner of various pieces of real estate, and was engaged in managing that and in manufacturing and in other business. His indebtedness at that time amounted to about sixty thousand dollars. By his will he gave his wife what she would be entitled to under the intestate laws, and the residue of his estate was given in equal proportions to his two daughters. After he had disposed of all his property, he granted to his daughter, his executrix, authority to sell and convey at public or private sale any or all of ³⁵⁵ the real estate of which he might die seised. He then added the clause of the will above quoted.

It is unquestionably true that an executor cannot subject any assets of the estate to liability for trade debts unless the will of the testator confers the authority. His duties as executor do not go to that extent. But it is settled that a testator may by his will empower his executor to carry on the business in which he is engaged at the time of his death, and when he does so he subjects the assets of his estate to debts contracted for that purpose. Whether liability for the trade debts of an executor extends to the entire estate or is limited to a specific fund depends upon the authority conferred upon the executor by the will. In Toller's Law of Executors, 166, it is said that articles of copartnership may provide for continuing a partnership, "or the testator may by his will direct his executors to carry on his trade after his death, either with his general assets, or appoint a specific fund to be severed from the general mass of his property for that purpose." And in Williams on Executors, *1688, the author says that "the testator may, by his will, qualify the power of his executor to carry on trade, and limit it to a specific part of the assets, which he may sever from the general mass of his property for that purpose." In Laughlin v. Lorenz, 48 Pa. St. 275, 86 Am. Dec. 592, it is held that the personal representatives of a deceased partner may carry on the business for and bind his estate, where a covenant to that effect exists in the articles of copartnership or he directs by will that it should be done. The above quotation from Toller's Law of Executors is cited as sustaining this principle, and the authorities cited there and here to support the opposite view are said by Judge Agnew, delivering the opinion of the court, to admit the proposition that the general assets of an estate may be liable for debts incurred in the continuance of the partnership. Lorenz's estate was held liable for the debts contracted by the surviving partner, the court using the following language: "In the present case neither the covenant

nor the will of Lorenz limited the fund to be made liable by the continuation of the partnership business after his decease, and we discover nothing therefore to restrain the general liability of his estate."

In the case in hand, the executrix accepted the trust committed ³⁵⁶ to her by the testator and exercised the power conferred upon her by the will. She took charge of and conducted all the business in which her father was engaged at the time of his death. She paid the indebtedness of sixty thousand dollars incurred by the testator during his management of his affairs and for which all the assets of his estate were liable. In accomplishing this work, she contracted certain debts which the appellants, who are beneficiaries under the will, claim should not be paid out of the general assets of the estate. This is not a contest between partnership and individual creditors, nor does it raise any question arising out of the partnership relation. The rights of the creditors with whom the testator contracted debts are not involved in this controversy. Those debts have been paid.

The language used by Levi Houston in his will which confers upon the executrix authority to conduct his affairs is broad and comprehensive. She is given "full power" to carry on his business. Everything necessary for the purpose therefore she may command and use. This is necessarily implied. In no other way could she accomplish the object of the trust. The testator was dead and no other person had authority to interfere with his business. If, therefore, it was to be continued as he had conducted it and as his will directed, it was absolutely necessary that the power of the executrix should be ample and unlimited. At the time of his death his business interests were many and large. He was engaged in manufacturing and in the mercantile business, as well as in renting numerous tenement houses and in farming. His executrix assumed charge of all these interests and carried on the various branches of the business as her testator had done. If the contention of the appellants be sustained, she was required to do this with the capital invested in the business. But her power is not thus qualified by the will, nor is she limited to any part of the assets of the estate in executing the trust imposed by the terms of the will. The testator conferred the power to carry on the business, and that implied, in the absence of anything in the will to the contrary, the right to appropriate sufficient assets of the estate to accomplish the object. As said in the authorities cited above, he might have

limited her power to a specific part of the assets of his estate, ³⁵⁷ and had he done so she would have been compelled to observe the restrictions placed upon her in the will. In the absence of anything in the will, however, manifesting an intention on the part of the testator to limit the source of revenue to be employed in the business, the executrix may, under the power granted her, use the general assets of the estate. The power of the testator to authorize his executor to continue his business after his death, and the designation of the funds of his estate to be devoted to that purpose, were alike entirely and solely under his control and subject alone to his testamentary direction. In language that is explicit and amply sufficient, he has conferred authority upon his executrix to carry on his business after his death, without exercising his conceded right to limit the fund to be devoted to that purpose. We cannot presume that the testator intended to impose any restriction upon her right to use the assets of his estate in the discharge of her duties as trustee.

The evident purpose of the testator in the last clause of the fourth item of his will was to put his executrix in his place with like authority as himself in the management and control of the estate. While he did not fix any time in which she should conduct the business, it may have been his intention that she should retain control until she paid the indebtedness against it, and then carry out the scheme of distribution directed in the will. Again, he may have thought that his personal representative should have discretionary power to continue his business, so as to avoid loss by being compelled to close it out within the time required for the settlement of decedent's estates. With a view to realizing the full value of his investments, considering the character of his property and the large indebtedness, it doubtless occurred to him that his executrix should have ample powers in the administration of his estate. But whatever may have been his undisclosed intention or purpose, the will placed in the hands of his executrix the estate to be managed and controlled by her with the authority in doing so to incur the necessary obligations.

The widow's interest in the decedent's estate was acquired by virtue of the will, and not under the intestate laws. The decedent did not die intestate. The widow was at liberty to reject the provision made for her by the testator, and this would ³⁵⁸ have created an intestacy as to her. She, however, did not elect to take against the will, but, on the contrary, accepted the profits accruing to her from the management of the estate by

the trustee. The will defines her interest and she will receive it on the settlement of the estate, the assets of which are liable for the debts contracted by the trustee.

The learned counsel for the appellants has discussed the right or authority of the executrix to delegate to another her power to conduct the business. The question, however, is not raised by any assignment of error and need not be determined.

The appellants complain that the trustee has been unfaithful to her trust and has squandered the estate. If this be true, the beneficiaries under the will had an adequate remedy and should have invoked it. Since the testator's death in 1892 they have permitted the trustee to manage the affairs of the estate as directed in the will, without heretofore alleging, so far as the record discloses, any improper or negligent conduct or any disregard of duty by her. This proceeding does not raise the question and hence it need not be considered.

The plaintiffs' bill prayed for a decree that partition of the real estate of the testator be made between his daughters and his widow. The answer denied the right of partition until payment of the debts incurred by the executor in the conduct of the testator's business as directed by his will. Complainants contended that the real estate was not liable for the trade debts of the executrix. The court, however, held that the general assets, including the real estate, were liable for the obligations thus contracted, but granted the prayer of the appellants and awarded partition. The appellees were satisfied with this order. Subsequently the appellants, notwithstanding partition was awarded as they had asked, moved the court to dismiss the bill. This action was taken by the appellants for the purpose of having this court construe the will of the testator, and determine whether the general assets of his estate are liable for the trade debts of the executrix, and whether the widow takes under the will or under the intestate law. The court below made a pro forma order dismissing the bill and refusing partition. This order having been made on motion of the appellants for the purpose stated, we will not now reverse the trial judge, although his decree might be erroneous. However, the questions raised 359 by this appeal having been disposed of, we will give the appellants, if they desire it, an opportunity to have determined under the will their right to partition by permitting them, notwithstanding the affirmance of the decree, to apply to the court below to vacate the decree dismissing the bill.

The assignments are dismissed and the decree of the court is affirmed at the costs of the appellants.

An Executor ordinarily has no authority to carry on the business of his decedent, and if he does so, it is at his own risk. When authorized by the will, however, he may continue the testator's business: See the monographic note to *Fletcher v. American Trust etc. Co.*, 78 Am. St. Rep. 196, 197.

IN RE ASH'S ESTATE.

[202 Pa. St. 422, 51 Atl. 1030.]

EVIDENCE—Rules of as Applied to State.—If the state comes into its courts, it is subject, like all other suitors, to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. (pp. 658, 659.)

EVIDENCE.—Statutes of Limitation do not Apply to the State, but rules of evidence and legal presumptions are not changed for or against the state as a suitor. (p. 659.)

PAYMENT, Presumption of as Against the State.—Presumption of Payment from lapse of time is simply a rule of evidence affecting the burden of proof, and applies to the state the same as to ordinary suitor. (p. 659.)

Pemose Ash was a county treasurer from 1845 to 1848, and as such charged with the collection of certain state taxes. When he retired from office he was indebted to the state in a large sum of money. In 1850, Ash conveyed to a trustee certain lands in trust to sell, and with the proceeds pay the debt to the state. Some of these lands were sold in 1855, and the proceeds thereof paid to the state. In 1895, a substituted trustee received a large sum of money from the sale of the remainder of the lands. This fund was claimed in part by the state and also by Elisa Daley, administratrix of Ash. Appeal from a judgment against the state dismissing exceptions to the auditor's report.

J. F. Campbell, for the appellant.

A. T. Freedley and W. B. Rawle, for the appellee.

⁴²⁴ MITCHELL, J. When the commonwealth comes into its courts, it is subject like all other suitors to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and

must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. Statutes of limitation do not apply to it, because the maxim, "Nullum tempus occurrit regi," though probably in its origin a part of royal prerogative, has been adopted in our jurisprudence as a matter of important public policy. But rules of evidence and legal presumptions are not changed for or against the state as a suitor. A statute of limitation is a legislative bar to the right of action, but the presumption of payment from the lapse of time is **not a bar at all**, but simply a rule of evidence, affecting the burden of proof: *Miller v. Williamsport Overseers*, 17 Pa. Super. Ct. 159. It is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interests of repose and the ending of litigation. There is no good reason why it should not apply to the commonwealth just as other legal rules and presumptions do. And so it has been ruled. ⁴²⁵ In *Stewart's Estate*, 147 Pa. St. 383, 23 Atl. 599, it was held that after forty-two years, a collateral inheritance tax will be presumed to be paid.

The auditor in the present case applied the presumption of payment to the claim of the commonwealth, and found that there was not sufficient evidence to overcome the presumption. This was correct on principle, and we see no good ground to doubt his conclusion on the facts. In this view the other matters argued as error become immaterial.

Judgment affirmed.

The Statute of Limitations does not run against a state, unless it is expressly made subject to the statute: See the monographic note to *Schneider v. Hutchinson*, 76 Am. St. Rep. 488.

A Presumption of Payment arises after the lapse of twenty years: *Hammel v. Lilly*, 188 Pa. St. 463, 68 Am. St. Rep. 879, 41 Atl. 613; *Latimer v. Trowbridge*, 52 S. C. 193, 68 Am. St. Rep. 893, 29 S. E. 634. This is an artificial and arbitrary rule of law, and, unlike the statute of limitations, is not a bar to an action on the original contract: *Gregory v. Commonwealth*, 121 Pa. St. 611, 6 Am. St. Rep. 804, 15 Atl. 452. It has been held that this presumption applies to the payment of taxes: See the monographic note to *Alston v. Hawkins*, 18 Am. St. Rep. 884.

DOUGHERTY v. LEHIGH COAL AND NAVIGATION COMPANY.

[202 Pa. St. 635, 52 Atl. 18.]

RES JUDICATA.—The Verdict of a Jury is not admissible as evidence to create an estoppel before it has received the sanction of the court by passing into a judgment. Until then it is liable to be made nugatory by an order arresting judgment or granting a new trial. (p. 661.)

J. O. Ulrich, for the appellant.

W. Wilhelm, J. W. Moyer and G. Dyson, for the appellee.

637 BROWN, J. Patrick McGee left with the Lehigh Coal and Navigation Company eleven thousand two hundred dollars as a loan, taking from it a certificate of indebtedness for that amount. He died December 29, 1899, and his administrator, John Dougherty, brought this suit to recover the amount alleged to be due his estate. The company was at all times willing to pay the loan, but Mary Andrews, the appellant, having claimed that McGee, in his lifetime, had made her a gift of the certificate, payment could not be made with safety to his administrator, and hence this suit, in which she was allowed to intervene as a party defendant upon her own petition, setting forth that the certificate and the entire sum of money which it represented belonged to her. On the trial of the case, the verdict was for the plaintiff, on which judgment was subsequently entered, and on this appeal from it the single error complained of is the court's refusal to allow the appellant to offer in evidence the verdict in her favor in the suit brought against her in the court below by the same plaintiff, to March term, 1900, No. 209. That suit was in trespass for her alleged unlawful detention of the certificate, on which this action of assumpsit was brought, and, after a trial, the verdict was in her favor. Reasons were immediately filed for a new trial, and a rule to show cause, granted on November 28, 1900, was made absolute December 23, 1901. During the pendency of this rule the present case was called for trial on November 25, 1901, ⁶³⁸ and on November 27, 1901, a verdict was rendered for the plaintiff.

The offer of the record in the suit to March term, 1900, No. 209, was made, as was stated in the court below, as well

as here, for the purpose of showing that the claim of the appellant to the money in the hands of the Lehigh Coal and Navigation Company was *res adjudicata*, the verdict in her favor being, as contended, a bar to the plaintiff's right to recover in this suit. The offer was disallowed for no reason given by the court at the time, but, in his opinion refusing a new trial, it is evident that it was excluded by the learned judge because the suit was between other parties, and for the still better reason that there had been no judgment on the verdict. For this latter reason we sustain the court's ruling. The error into which counsel for appellant seems to have fallen is in confounding a verdict upon which judgment has been entered, or which cannot be disturbed, with one upon which judgment cannot be entered until the court passes upon the reasons before it for setting it aside. A verdict, when rendered, is under the control of the court in which the case was tried, and the power to set it aside for good reasons must be exercised. Without this power and its exercise in proper cases, justice could not be judicially administered. The verdict which, in this case, the appellant insists was conclusive of her right to the money was subsequently set aside by the court, and, at the time she wished to offer it in evidence, the motion to set it aside was pending. It was then evidence of nothing at all, except that it had been rendered. It was conclusive of nothing, for the record of which it formed a part showed at the time it was offered in evidence that it might be set aside; as a matter of fact, as already stated, it was thereafter set aside, and, on the new trial awarded, a finding might have been against her instead of for her. The uncertainty of her right to judgment on it at the time she wished to use it as conclusive of her right to the money in controversy made it uncertain and of no value as a piece of evidence in support of her claim. If judgment had been entered on it, it would have been conclusive upon the parties to the issue in which it was rendered of what the jury had found; but, with no judgment on it, it was inadmissible: Wharton on Evidence, sec. 781; Black on Judgments, sec. 506; *Middletown Furniture Mfg. Co. v. Philadelphia etc. R. R. Co.*, 145 Pa. St. 187, 22 Atl. 747. "No question becomes *res adjudicata* until it is settled by a final judgment. For this reason, the verdict of a jury is not admissible as evidence to create an estoppel, before it has received the sanction of the court, by passing into a judgment. Until then, it is liable to be made nugatory by

an order arresting judgment or granting a new trial": Freeman on Judgments, sec. 251.

Judgment affirmed.

Res Judicata.—A *Verdict* cannot operate as *res judicata*, for not until judgment does a matter become *res judicata*: McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

HUNTER v. HUNTER.

[63 S. C. 78, 41 S. E. 33.]

EXECUTORS—Limitation of Actions.—An executor, under certain circumstances, may pay debts of the testator barred by limitation after his death. (p. 665.)

LIMITATION OF ACTIONS—Burden of Proof.—One who seeks to avail himself of the benefit of the statute of limitations must assume the burden of proving the facts necessary to sustain his plea. (p. 666.)

SUBROGATION—Sale of Land Under Defective Power.—If lands impressed with the burdens of the testator's debts, the support of the testator's wife and children, and the education of such children, are sold by the executrix under a defective power, the purchasers are entitled to retain possession until the purchase money paid by them, which has been applied, either directly or indirectly, to the removal of such burdens, has been refunded. (p. 668.)

RES JUDICATA.—Issues Involved in the case, but not passed upon by the court in deciding it, are not *res judicata*. (p. 669.)

EVIDENCE—Secondary, When Admissible.—After the admission of evidence to show the loss of notes by fire, secondary evidence as to their contents is admissible. (p. 669.)

RENTS.—Purchaser of Land in Possession, who purchased under a defective power, can be made to account as trustee only for the rents and profits received, and not for the rental value of the land. (p. 669.)

ADVERSE POSSESSION by Purchaser of land under defective power cannot be set up against the *cestuis que trust* during the minority of some of them. (p. 669.)

The decree of the lower court and exceptions thereto mentioned in the principal case are not necessary to a clear understanding of the opinion herein.

N. B. Dial, W. H. Martin, and T. P. McGowan, for the appellants.

Haynsworth, Parker & Patterson and Ball, Simpkins & Ball, for the appellees.

⁸⁸ McIVER, C. J. This is the second appeal in this case, the first being reported in *Hunter v. Hunter*, 58 S. C. 382, 79 Am. St. Rep. 845, 36 S. E. 734, to which reference must be had for a fuller statement of the facts than it is deemed necessary to make here. For the purposes of this appeal, it will be necessary to recapitulate here some of the more prominent facts which were either undisputed or fully established by the testimony, as follows: The land out of which the various claims set up in this case are to be satisfied originally belonged to Dr. Samuel M. Hunter, who departed this life on the 25th of April, 1883, having first duly made his last will and testament, leaving his wife, the defendant, Nannie W. Hunter, and his children, who are named, as the plaintiffs in this action; that said testator, by his will, devised this land to his wife, Nannie W. Hunter, "for and during her lifetime, to support herself and my children, and to educate my children"; that the said Nannie W. Hunter was the duly qualified executrix of said will, and as such being advised by her father, who is characterized as "an attorney at law of many years' experience at the bar," that she had the power so to do, undertook to sell and convey the said land under which sales the defendants (other than Nannie W. Hunter) claim either mediately or immediately; ⁸⁹ that these sales were made for a full and fair price, and the purchase money was paid to the said Nannie W. Hunter, who, as she said in her testimony at the first trial, applied the whole of such purchase money to the payment of the debts of the testator—her deceased husband—though she varied that statement somewhat at the second trial, as will be hereinafter noted. Under the former appeal, this court determined that under the proper construction of the provisions in the will of the testator above referred to, the widow took an estate for life encumbered with a trust to apply the same to the support of herself and the children of the testator and to educate said children, without any power to sell the same. And while the court, in rendering its decision under the former appeal, evidently recognized the rights of the defendants to be subrogated to the rights of the creditors of the testator whose debts had been paid out of the proceeds of the sale of the land, yet as the question of subrogation had not been made in terms in the pleadings as they then stood, and was not considered or decided by the circuit

judge, it was thought best to "remand the case to the circuit court, for the purpose of enabling that court to pass upon the question of the defendants' right to subrogation, with leave to the defendants, if they shall be so advised, to amend their answer by setting up, formally, their right to subrogation." Accordingly, when the case went back to the circuit court for this purpose, the defendants availed themselves of the permission given and filed their amended answer, setting up formally their right to subrogation. To this amended answer the plaintiffs filed a reply, in which they claim "that the alleged debts of S. M. Hunter, deceased, on which it is claimed that Nannie W. Hunter paid the proceeds of the sale of the land in controversy, matured and arose more than six years prior to the death of the said S. M. Hunter, and that at the time of his death they were barred by the statute of limitations." Under the pleadings as thus amended the case came on for trial before his honor, Judge Benet, when the testimony taken at the former trial ⁹⁰ was offered in evidence, together with other testimony, all of which is set out in the "case," and the decree set out in the "case" was rendered by Judge Benet, from which the defendants (other than the said Nannie W. Hunter) appeal upon numerous exceptions, which are set out in the record. A copy of this decree and the exceptions thereto will be included in the report of this case, by the reporter.

We do not propose to consider these exceptions seriatim, but will confine our attention to what we consider the controlling questions in the case. It will be observed that the circuit judge bases his conclusion, rejecting the appellants' claim to subrogation, solely upon the ground that the debts of the testator which were paid out of the proceeds of the sale of the land were all barred by the statute of limitations "at the time of their payment"—not that they were thus barred at the time of the death of the testator, as alleged in the plaintiff's reply, setting up the plea of the statute. Now, while it is quite true that an executor would not be justified in paying a debt of his testator which was barred at the time of his death, for the obvious reason that there was then no legal obligation to pay such debt, yet it does not follow that a debt which becomes barred after the death of the testator would stand in the same category; for it may happen, and has happened, that the executor may, with a view to prevent a sacrifice of the property of his testator, induce the creditor to defer action until some arrangement could be made for the pay-

ment of such debt; and in such a case a court of equity might well feel justified in allowing an executor to carry out such arrangement in good faith. But what is more to the point, we think the circuit judge was clearly in error in saying that all of these debts were barred at the time of their payment; for, with a single exception (the note of J. C. Hunter, which will be more particularly considered hereinafter), there is no evidence whatever that any of these debts were barred at the time of their payment; and certainly no evidence that they were barred at the time of the death of the testator. It is true that there was ⁹¹ testimony tending to show that some, but not all, of the notes evidencing the debts paid by the executrix, were made before 1876; but how long before, or when they matured, or whether they were promissory or sealed notes, there was not a particle of testimony. Now, when it is remembered that the time during which the executor is exempted from suit must be added to the statutory period (*Lawton v. Bowman*, 2 Strob. 190), it is far from clear that any of these notes were barred, unless it be the note of J. C. Hunter, to which these remarks do not apply, but which will hereinafter be specially considered. In addition to this, the rule is well settled that one who seeks to avail himself of the benefit of the statute of limitations must assume the burden of proving the facts necessary to sustain such a plea: *Moore v. Smith*, 29 S. C. 254, 7 S. E. 485; and as is said in *Yancy v. Stone*, 9 Rich. Eq. 429: "The party who sets up the bar of the statute to an otherwise just claim must prove strictly that he is entitled to its protection."

Next as to the J. C. Hunter note: While it is quite true that this note does appear, from the copy which we find in the "case," to have been a promissory note, bearing date 20th of June, 1873, and payable one day after date, and, therefore, upon its face barred by the statute, yet that note was in suit, and in the complaint there was an allegation of a payment made in 1879, within the statutory period; but it was claimed that this was a joint and several note of J. P. Hunter and S. M. Hunter, and that such payment was made by J. P. Hunter and not by S. M. Hunter, and, therefore, did not have the effect of reviving the debt as against S. M. Hunter, under the case of *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44. That case does so hold; but up to the time that decision was rendered, which was on the 27th of November, 1885, after the note was paid, it was an unsettled question in this state, as to

the effect of such payment, as may be seen by the opinion of the learned justice, who dissented in *Walters v. Kraft*, 23 S. C. 578, 55 Am. Rep. 44. It may, therefore, be regarded as a compromise of a doubtful right in a pending suit, and in that way the payment of such ⁹² note may be justified. But, as there are not sufficient facts before us to enable us to reach a satisfactory conclusion, we leave this particular matter for further consideration by the circuit court, to which this case will be remanded for that and other purposes hereinafter indicated.

Appellants' twenty-sixth exception makes the point that the circuit judge erred in not finding that if all the proceeds of the sale of the land were not applied by Nannie W. Hunter to the payment of the debts of the testator, so much of said proceeds not so applied were expended by her for her own use and benefit, and for the support and education of her children—the plaintiffs herein; and the appellants should be subrogated to the rights of creditors, and the cestui que trustent, to the extent of the amount so paid and expended. The point made by this exception is well taken. If the testimony of Nannie W. Hunter, as given at the first trial, is to be taken as the correct version of the matter, then the undisputed testimony shows that the whole of the proceeds of the sale of the land were applied to the payment of the debts of the testator. It is true that when she was examined as a witness at the last hearing, she testified that her testimony at the previous hearing was given hastily, and “after studying it over I remembered it better”; and then proceeds to testify that all the proceeds of the sale were not applied to the debts, but that she advanced her own money to pay some of the debts and used some of the proceeds of the sale in keeping up the farm and making improvement thereon, where the children were supported and were sent to school, for which she paid with her own money. Indeed, her testimony at the last hearing tends to show that she used the proceeds of sale as if it belonged to her, thinking that she had the right to do so; so that even if her testimony given at the last hearing be accepted as the correct version of the matter, then it is apparent that a portion, at least, of the proceeds of the sale were applied to the payment of the debts of the testator, either directly or indirectly, by replacing the amount of her own money advanced by her for that purpose, ⁹³ and the balance was applied either directly or indirectly to the support of the family and the tuition of the children. If so, then the appellants would have the

right to be subrogated to the extent of so much of the proceeds of the sale as were so applied. The doctrine of subrogation, as applicable to this case, rests upon this principle that where persons have in good faith bought the lands of a decedent, and it turn out that the sale is void for want of authority to make it, then, as a matter of equity and good conscience, those who have purchased the property have a right to retain the property until the amount of the purchase money paid by them, which has been applied to the removal of burdens resting on such property, shall be refunded to such purchasers. As is said in *Freeman on Void Judicial Sales*, 51, which is quoted with approval in *Cathcart v. Sugenhimer*, 18 S. C. 132, and again in the former opinion in this case, *Hunter v. Hunter*, 58 S. C. 394, 79 Am. St. Rep. 845, 36 S. E. 738: "If by a sale of the lands of a decedent, his debts are paid and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has by his purchase paid, and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled." Now, this land was subjected to two burdens: 1. The unpaid legal liabilities of the testator; 2. The support of testator's wife and children, and the education of said children; and, upon the principle above stated, these appellants have the right to retain possession of the same until the amount of the purchase money paid by them, which has been applied either directly or indirectly to the removal of these burdens, has been refunded to them. From this it follows that the circuit judge was in error in requiring the persons substituted as trustee to take possession of the lands in question before it was judicially ascertained whether any, and if so, how much, of the purchase money paid by the appellants had been applied to the removal of the above-mentioned burdens upon the land, and before the sums so ascertained had been refunded to the appellants; and to this extent exception 18 must be sustained.

⁹⁴ Such of the appellants' exceptions as make the point that the question whether the proceeds of the sale were applied to the payment of the debts of the testator should have been regarded as *res judicata* must be overruled; for Judge Watts said in his decree that it was unnecessary to pass upon that issue, as he based his judgment exclusively upon the ground that under his construction of the will the executrix took a life estate in the land, which she had a right to sell, and as she was still living, the action was prematurely brought, and for that reason alone

he rendered judgment that the complaint be dismissed, which was reversed by this court; and this court certainly did not undertake to pass upon the question whether any, and if so, how much, of the proceeds of sale were applied to the payment of the testator's debts; but, on the contrary, remanded the case to the circuit court for the express purpose of enabling that court to pass upon the question of subrogation, which necessarily involved the question which is now claimed to have been already adjudged.

Exceptions 6 and 29, raising questions as to the competency of testimony, are overruled. There was testimony tending to show that the notes of the testator which were claimed to have been paid out of the proceeds of the sale were destroyed by fire, and therefore secondary testimony as to their contents became admissible.

The points made by exceptions 9 and 11 are left open, to be considered by the circuit court when carrying out the purposes for which this case will be remanded.

Exception 10 is based upon a misconception of the decree of the circuit judge, and cannot, therefore, be sustained.

Exceptions 15, 16, 17, 19, 21, 22, 23, raising questions as to the rents and profits, are left open, for the reason that these questions can better be determined under the decree which will be rendered by the circuit court under the order remanding this case for certain purposes; and in this connection we may say that the point made as to betterments by ⁹⁵ exception 27 is also left open, in order that such point may also then be passed upon.

As to the exception 20, we do not understand that the circuit judge held the appellants accountable for the "rental value" of the land; but if so, that was error, for if the appellants should be held liable at all, it should be for rents and profits received, and not for rental value. Exception 24 cannot be sustained by reason of the minority of the plaintiffs, or at least some of them.

The point raised by exception 25 is left open, as that matter should be considered when the circuit court passes upon the questions for the determination of which the case will be remanded to that court.

So, also, as to the point raised by the exception 28.

The case must, therefore, be remanded to the circuit court, for the purpose of considering and determining specifically what amount of the purchase money paid by the appellants, or those

under whom they claim, was applied to the removal of the burdens resting upon the land as hereinabove stated; whether any of the debts of the testator, which were paid either directly or indirectly out of the proceeds of the sale of the land, were barred by the statute of limitations at the time of the death of the testator, and if so how much; and in this inquiry the burden of proof showing that such debts were thus barred shall be upon the plaintiffs, and also for the purpose of considering and determining the several points left open, as hereinabove stated.

The judgment of this court is, that the judgment of the circuit court, in so far as it is inconsistent with the views herein announced, be reversed, and that the case be remanded to the circuit court for the purposes hereinabove indicated.

A Purchaser at an Invalid Sale of a Decedent's land for the payment of debts is entitled to be subrogated, to the extent that the money paid by him has been applied to the payment of such debts, to the rights of the creditors of the decedent. And he may retain possession of the property as security for the repayment of the sums to which he is entitled: *Hunter v. Hunter*, 58 S. C. 382, 79 Am. St. Rep. 845, 36 S. E. 734; *Perry v. Adams*, 98 N. C. 167, 3 S. E. 729, 2 Am. St. Rep. 326, and note. See in this connection. *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813.

The Statute of Limitations must be pleaded, in order to be available: *Gilbert v. Hewetson*, 79 Minn. 326, 79 Am. St. Rep. 486, 82 N. W. 655; *Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 Am. St. Rep. 529, 82 N. W. 1023. As to whether this rule is applicable to claims against the estate of a decedent, see *Martin v. Martin*, 108 Wis. 284, 81 Am. St. Rep. 895, 84 N. W. 439; *Easton v. Somerville*, 111 Iowa, 164, 82 Am. St. Rep. 502, 82 N. W. 475. Some authorities hold that the statute pleaded as a defense casts the burden of proof upon the plaintiff to show that his action was commenced within the time limited: *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. Rep. 699, 29 S. E. 827. Compare the note to *Pond v. Gibson*, 81 Am. Dec. 725, 726. The power of an executor to waive the statute of limitations is discussed in the monographic note to *Fletcher v. American Trust Co.*, 78 Am. St. Rep. 188-190.

PORTER v. CHARLESTON AND SAVANNAH RY. CO.

[63 S. C. 169, 41 S. E. 108.]

CONSTITUTIONAL LAW—Pleading.—It is not necessary, in order to raise the question of the constitutionality of a statute in a pleading, to specify the section and article of the constitution with which such statute is claimed to conflict. It is sufficient if the constitutional provision infringed upon is plainly specified. (p. 672.)

PRACTICE—Harmless Error.—Error of the lower court in refusing to consider the constitutionality of a statute is harmless if the statute is determined to be valid upon appeal. (p. 673.)

CONSTITUTIONAL LAW—Class Legislation—Common Carriers.—A statute subjecting all common carriers to a penalty for failing or refusing to pay a claim for loss of or damage to any article intrusted to them for transportation within sixty days from the time when such claim is made, is not unconstitutional, as creating an unjust discrimination against, or denying the equal protection of, the law to common carriers, or as an unlawful interference with interstate commerce. (pp. 673, 676.)

CONSTITUTIONAL LAW—Class Legislation.—Laws which are applicable alike to all persons, natural or artificial, belonging to a given class are not violative of constitutional provisions forbidding a denial to any person of the equal protection of the laws. (p. 674.)

The facts are stated in the opinion, and it is unnecessary to set forth the opinion of the lower court and the exceptions thereto.

Mordecai & Gadsden, for the appellant.

G. M. Buckner, E. F. Warren, and A. M. Boozer, for the appellee.

¹⁷⁵ McIVER, C. J. This action was instituted in a magistrate's court, and carried thence by appeal to the court of common pleas, and from the judgment of the last-mentioned court this appeal has been taken. The object of the action was to recover the penalty imposed by the second section of an act entitled "An act to require all common carriers to pay all loss of, or damage for loss, damage and breakage of any article shipped over their lines, or to refuse to do so within a certain time," approved the 25th of February, 1897: 22 Stat. 443. The pleadings in the case were more formal than is usual in a magistrate's court, the plaintiff having filed a regular complaint setting forth his cause of action, to which the defendant filed a formal answer setting up two defenses; the latter being that the act of 1897, upon which the plaintiff's action was based, is unconstitutional, for two reasons, which are thus stated in the answer: "1. On the ground that it discriminates against common carriers and imposes a penalty upon them for failure to pay claims which is not imposed upon any other citizen of this state; 2. On the ground that it cannot apply to interstate commerce." The case was heard by the magistrate, who rendered ¹⁷⁶ judgment in favor of the plaintiff without in any way alluding to the constitutional question presented by the answer. From this judgment defendant appealed to the circuit court upon the two grounds set out in the "case," the two grounds upon which the first exception is based being identical with those stated in the answer, and the second ground of appeal,

which is not involved in this appeal, need not be stated here. The circuit judge rendered judgment dismissing the appeal and affirming the judgment of the magistrate, and from such judgment of the circuit court this appeal has been taken upon the several exceptions set out in the record. The judgment of the circuit judge as it appears in the "case" (except so much thereof as relates to the second exception to the magistrate judgment), together with the exceptions thereto, will be embraced in the report of this case by the reporter.

It is not very clear from the terms used in the judgment of the circuit judge whether he simply held that the constitutional question had not been properly raised, or whether he held that the act in question (1897) was constitutional. We must, therefore, consider the matter in both aspects. If he simply held that the constitutional question was not properly raised, and could not, therefore, be considered, then we think he erred in so holding; but whether this was reversible or harmless error will be presently considered. The circuit judge seemed to think that because the defendant, neither in its answer nor in its exceptions to the judgment of the magistrate, designated neither the article nor section of the constitution with which the act of 1897 was claimed to conflict, although the constitutional provision with which the act was claimed to conflict—the clause prohibiting discrimination in legislation—was distinctly specified both in the answer and in the exceptions, the question of the constitutionality of the act was not properly presented. This was, we think, too narrow a view of the matter, especially when applied to pleadings and proceedings in an inferior court, where, as is well known, the ¹⁷⁷ same strictness is not required as in a court of general jurisdiction. Indeed, even in a court of general jurisdiction it is not always necessary to specify what particular section of what particular article of the constitution is violated by the terms of a given act of the legislature. Suppose, for example, a party is desirous of assailing the constitutionality of an act upon the ground that it impairs the obligation of a contract and should so allege, without specifying the particular section of the particular article of the constitution which forbids the passage of any law impairing the obligations of a contract, could it, for a moment, be successfully contended that in each case the constitutional question had not been properly raised and need not, therefore, be considered? No case has been cited, and, so far as we are informed, can be cited, which holds that in order to raise the question of the constitu-

tionality of an act of the legislature, it is necessary to specify the section and the article of the constitution with which such act is claimed to conflict. On the contrary, where the constitutional provision with which such act is claimed to conflict (as it is here) is plainly specified, that is sufficient. The case of *Tompkins v. Augusta etc. R. R. Co.*, 21 S. C. 420, cited by counsel for respondent, is obviously not in point; for at page 432 the court said that the constitutionality of the act there sought to be impeached was raised for the first time in the argument before the supreme court. "But inasmuch as no such question was raised in the circuit court or by any of the exceptions, it is not properly before us for consideration. That case, therefore, lends no support to the position taken by the circuit judge; for here the constitutional question was raised in the answer of the defendant, and it was the duty of the magistrate to pass upon it; and although he does not appear to have done so, in terms, yet it must be assumed that if the question was properly raised, as we have seen it was, he did not hold the act unconstitutional; for if he had, he could not have rendered the judgment he did, for if the act was unconstitutional, it was a nullity, and afforded no basis for the plaintiff's cause ¹⁷⁸ of action. The question was again raised by the exceptions to the magistrate's judgment, and it was the duty of the circuit judge to pass upon it, and it must be assumed that he held the act to be free from any constitutional infirmity. Then, again, the question is again most specifically and plainly presented by the several exceptions to the judgment of the circuit judge, imputing error to him in not holding the act of 1897 to be in violation of certain specified sections and articles both in the constitution of the United States and of this state. So that even if there was error on the part of the circuit judge in holding that the constitutional question was not properly raised, and if at the same time it should be ascertained that the act of 1897 is free from any constitutional infirmity, then such error on the part of the circuit judge becomes harmless, and is not reversible error.

This brings us to the consideration of what is the real question in this case, viz., whether the act of 1897 is in conflict with the provisions of the constitution either of this state or that of the United States. The provisions with which the act is claimed to be in conflict is that contained in section 1 of article 14 of the constitution of the United States, and that contained in section 5 of article 1 of the constitution of this state. As these provisions are practically identical, both prohibiting the denial

to any person the equal protection of the laws, these two constitutional provisions need not be considered separately. The argument is, as we understand it, that by the provisions in the act of 1897, subjecting common carriers to a penalty for not paying, or refusing to pay, a claim for any loss of, or damage to, any article intrusted to them for transportation within sixty days from the time when such claims shall be made, the act comes in conflict with the constitutional provision above referred to, and thus, it is contended, discriminates against common carriers, by subjecting them to a liability not imposed upon any other person, or any other class of persons, and thus denying them the equal protection of the ¹⁷⁹ laws. It is quite true that the act of 1897, above referred to (a copy of which is set out in the judgment of the circuit court, which is embraced in the report of this case, and, therefore, need not be repeated here), applies only to persons or corporations engaged in the business of common carriers, and has no application to any other person or class of persons; but this does not necessarily bring the act into conflict either with the constitutional provision of this state, or that of the United States, as has been held by this court in *McCandless v. Richmond etc. R. R. Co.*, 38 S. C. 103, 16 S. E. 429, and *Blum v. Richland Co.*, 38 S. C. 291, 17 S. E. 20, and by the supreme court of the United States in the cases cited by Mr. Justice Brewer in the case of *Gulf etc. Ry. Co. v. Ellis*, 165 U. S. 155, 17 Sup. Ct. Rep. 257. These cases establish the doctrine that while the object of these constitutional provisions, both federal and state, is to prevent discriminatory legislation, yet they cannot be so construed as to deprive the law-making department of the government of the power to make a classification of its citizens; so that laws may be passed which, if applicable alike to all persons, natural or artificial, belonging to a given class, are not violative of the provisions of the constitution forbidding a denial to any person of the equal protection of the laws. As is said by Mr. Justice Brewer, in delivering the opinion of the court in *Gulf etc. Ry. Co. v. Ellis*, at the page above cited: "But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undoubtedly true (citing numerous cases), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to

the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are ¹⁸⁰ distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." The classification made by the act of 1897, the validity of which is here questioned, is that of common carriers, and the provisions of the statute apply alike to every person, natural or artificial, engaged in the business of a common carrier. If, therefore, this is not an arbitrary classification, but rests upon distinctive differences between the business of a common carrier and that of any other class of persons, then the fact that the provisions of the act apply alone to one class of persons, common carriers, will not render the act obnoxious to the constitutional provisions above referred to. That there are well-marked distinctions between the kind of business carried on by a common carrier and that of any other class of business, is manifest and has always been recognized. As is said by the late Judge Cooley, in his valuable work on Constitutional Limitations, at page 390 of the second edition: "The legislature may also deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens"—and the distinguished author proceeds to give common carriers as one of the instances in which this may be done. In addition to this, it will be observed that the default for which the penalty is imposed is, not in failing to pay a debt, but in failing to pay, or refusing to pay, a claim of a character peculiar to common carriers, to wit, a claim for the loss of or damage to articles shipped over the lines of such common carrier. It was, therefore, not a debt of any character which might be contracted by anyone, but it was a liability of such a character as none but a common carrier would be likely to incur. The case of Gulf etc. Ry. Co., 165 U. S. 150, 17 Sup. Ct. Rep. 255, from which we have quoted above, seems to be largely, if not mainly, relied upon by counsel for appellant to sustain his contention ¹⁸¹ that the act of 1897 is unconstitutional. We think, however, that this case differs widely from that; for here the act of 1897 applies to all common carriers, while in the case cited, the Texas statute, which was there under consideration, did not apply to

all common carriers, but was limited in its application to one subdivision of the class known as common carriers, to wit, railway corporations. Again, the Texas act applied to any claim made "for personal service rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company," etc., and was not limited to such claims as were peculiarly incident to the business of a common carrier, as in the case of our act of 1897. This is quite sufficient to differentiate that case from this. We are of opinion that our act of 1897 was passed, not for the purpose of enforcing more speedy payment of claims against common carriers, but for the purpose of enforcing more prompt action on the part of common carriers in passing upon the validity of claims presented against them, and that the time allowed by the act—sixty days—after presentation of any claim, is reasonable and sufficient to afford an opportunity to investigate the propriety and legality of the claims; and that though the provisions of the act are applicable only to claims of a certain specified character against common carriers, and do not apply to any other class of persons, yet that does not bring the act in conflict with any constitutional provision, either state or federal, and hence the circuit judge could not have properly held the act of 1897 to be unconstitutional; and the exceptions raising this point must be overruled.

It only remains to consider the appellant's third exception, which imputes error to the circuit judge in not holding that the act of 1897 has no application to interstate shipments of freight by common carriers. In the first place, we are unable to perceive anything in the record before us showing that this was an interstate shipment of freight. On the contrary, the allegation in the complaint is that the defendant ¹⁸² company did, "on the eighteenth day of December, 1900, receive a certain lot of plows in the city of Charleston, South Carolina, consigned to above-named plaintiff, at Ridgeland, South Carolina, and that the plows were damaged in transit." But even if it had appeared to have been an interstate shipment, we do not see wherein our act of 1897 conflicts with the interstate commerce clause of the constitution of the United States, or with any act of Congress upon that subject. No such act has been cited, and we do not see any suggestion of conflict. The act of 1897 does not purport to regulate or in any way interfere with interstate shipments of freight. It simply imposes a certain duty upon "all common carriers doing business in this state," which in no way

relates to the transportation of the freight, but relates to a duty required of the common carrier after the transportation is completed. We do not think that appellant's third exception can be sustained.

The judgment of this court is, that the judgment of the circuit court be affirmed.

Remittitur in this case held up on application for writ of error to supreme court of United States.

Special and Class Legislation is considered in the monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789. The fourteenth amendment contemplates classes of persons, and protection is deemed equal when all the persons in the same class are treated alike under like circumstances and conditions: *State v. Broadbelt*, 89 Md. 565, 73 Am. St. Rep. 201, 43 Atl. 771; *Arms v. Ayer*, 192 Ill. 601, 85 Am. St. Rep. 357, 61 N. E. 851. The legislature may form classes for the purpose of police regulation: *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663; but the legislation must extend to and embrace equally all persons who are or who may be in like situation or circumstances, and the classification must be natural and reasonable, not arbitrary and capricious: *State v. Garbroski*, 111 Iowa, 496, 82 Am. St. Rep. 524, 82 N. W. 959.

Interstate Commerce.—*The Constitutionality of state regulations of interstate commerce* is considered in the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568; *Postal Telegraph Co. v. Richmond*, 99 Va. 102, 86 Am. St. Rep. 877, 37 S. E. 789. A state may subject telegraph companies to penalties for acts of negligence occurring within its limits, although such acts may be committed in dealing with messages transmitted to points in other states: *Western Union Tel. Co. v. Howell*, 95 Ga. 194, 51 Am. St. Rep. 68, 22 S. E. 286. Compare *Marshall v. Western Union Tel. Co.*, 79 Miss. 154, 89 Am. St. Rep. 585, 27 South. 614. But a statute imposing a penalty on carriers for varying the route of shipment of goods as designated by the shipper is unconstitutional when applied to goods shipped from one state to another: *Lowe v. Seaboard Air Line Ry.*, 63 S. C. 248, post, p. 678, 41 S. E. 297. Imposing a penalty upon railroad companies for a failure to ship freight within five days is not an interference with interstate commerce: *Bagg v. Wilmington etc. R. R. Co.*, 109 N. C. 279, 26 Am. St. Rep. 569, 14 S. E. 79.

LOWE v. SEABOARD AIR LINE RAILWAY.

[63 S. C. 248, 41 S. E. 297.]

CONSTITUTIONAL LAW—Interference with Interstate Commerce.—A statute imposing a penalty on common carriers for varying the route of shipment of goods as designated by the shipper is unconstitutional and void as an unlawful interference with interstate commerce, when applied to goods shipped from one state into another. (pp. 679, 680.)

INTERSTATE COMMERCE—Regulation of.—While a state, under its police power, may adopt regulations designed to promote domestic order, morals, health, and safety even though indirectly or remotely affecting interstate commerce, yet it cannot adopt regulations which directly trammel or burden such commerce. (p. 679.)

Hydrick & Sawyer, for the appellant.

Glenn & McFadden, for the appellee.

248 JONES, J. This action was brought to recover a penalty, under the act of 1896 (22 Stat. 120), for varying the routing designated by the shipper. A nonsuit was granted on two grounds: 1. That the said act is unconstitutional, in so far as it attempts to regulate interstate commerce; 2. That the diversion from the route designated by the shipper took place in North Carolina, and for such diversion defendant was not liable under a penal statute of South Carolina. The appeal questions the correctness of said ruling.

The defendant is a railroad corporation, organized under **249** the laws of Virginia and also of North Carolina, and was and is doing business in this state. It appears from the "case" that "the plaintiff introduced testimony tending to show: That on and prior to November 27, 1901, he resided at or near Lilesville, North Carolina, and on that date, he delivered to the defendant, at Lilesville, his household goods for shipment to Union, South Carolina, where he has since resided; that before the shipment he stated to the defendant's agent that he wished to ship his goods without having them transferred from one car to another, and was informed that he could do so by shipping them via Charlotte, North Carolina, and Spartanburg, South Carolina; that the freight charges would be twenty-five dollars and thirty-four cents (about seventy cents a hundred), which was more than they would have been, if shipped via Carlisle, South Carolina, by which route the charges would have been from forty-eight to fifty-odd cents a hundred; that the goods, if shipped by Carlisle, would have to be transferred from the de-

defendant's road to the Southern by wagon from one depot to the other; that plaintiff paid the higher rate via Charlotte and Spartanburg, and delivered his goods to the defendant, placing them in a car furnished by defendant and sealing the car, according to instructions from defendant's agent; that both before and at the delivery of the goods to defendant, plaintiff designated the route via Charlotte and Spartanburg as that over which he wished his goods shipped, and so instructed defendant's agent, who assured him that they would be shipped by that route. The goods were actually shipped by way of Carlisle, South Carolina; that the lines of railroad operated by defendant from Lilesville diverged at Monroe, North Carolina, one branch going to Charlotte, and the other to Carlisle, and that the plaintiff's goods were diverted from the designated route at Monroe, North Carolina; that they could have been shipped via Charlotte and Spartanburg to Union; that the plaintiff could not read, and did not know how the bill of lading delivered to him by defendant or waybill was marked for the freight to be shipped, but thought that it was made out for shipment according to his instructions and the route designated. That at time bill of lading **250** was issued, plaintiff's son, who was assisting him, asked the agent if the route designated ought not to be put on the bill of lading, and the agent told him that he didn't put it on bill of lading, but that it was marked on waybill that goes with the car, which the conductor has to show him which way the car is going."

The action was brought under sections 5 and 6 of said act, which are as follows: "Sec. 5. That all persons shipping from, into, within or through this state shall have the right to designate the route or routes by which said goods shall be shipped, and that it shall be unlawful for any corporation or person other than the holder of the bill of lading to vary said routing so designated, or to ship the same by any other route, or to receive said goods if so diverted, unless the route so designated shall be interrupted or incapable of being used at the time by strike or casualty, preventing the running of trains thereof.

"Sec. 6. That any transportation company violating the provisions of any of the sections of this act willfully or knowingly shall be subject to a suit for each violation thereof at the instance of any person or owner of goods, or other persons or corporations, and upon proof of such violation, the said party instituting the same shall be entitled to recover a penalty of five hundred dollars for such violation. Each violation of this act shall constitute a separate cause of action."

While a state, under its police power, may adopt regulations designed to promote domestic order, morals, health and safety, even though such regulations may indirectly or remotely affect interstate commerce, yet it cannot adopt regulations which directly trammel or burden interstate commerce, because such would be an invasion of the power exclusively vested in Congress by the federal constitution: *State Freight Cases*, 15 Wall. 232; *Hall v. De Cuir*, 95 U. S. 485; *Wabash etc. Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4; *Covington etc. Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. Rep. 1087; *Railroad Commissioners v. Railroad Co.*, 22 S. C. 220. It ²⁵¹ is not doubted that transportation is an essential part of commerce, and that transportation of freight from a point in North Carolina to a point in South Carolina is interstate commerce. The portion of the act under consideration, in so far as it is sought to be applied in this case, is an attempt to regulate the shipment of freight into this state from another state. It operates directly upon the interstate shipment or transportation, and limits or restricts the carrier's freedom to ship or transport by the route which the carrier might deem best, and places the control of the route wholly in the hands of the shipper, except in the contingency of some strike or casualty preventing the running of trains on the designated route. The carrier is deprived of all right to contract to ship by the route which the carrier would choose, and is unable to vary the route designated by the shipper, no matter what circumstances might exist making a variation desirable, short of a casualty preventing the running of the trains. Such a restriction on the freedom of interstate contract and transportation we do not think is warranted by any necessity arising from domestic peace, and clearly invades the federal jurisdiction over interstate commerce.

In so far as the statute may be valid as a regulation of the local or internal commerce of the state, there was no testimony tending to show a violation of such statute within the state, and the nonsuit was proper also on this ground.

The judgment of the circuit court is affirmed.

Mr. Justice Pope concurs in the result.

Interstate Commerce.—While a state cannot interfere with transportation into or through its territory beyond what is necessary for its self-protection, it is authorized to provide for maintaining domestic order, and for protecting the health, morals, and security of its people. And this though interstate commerce is, to some extent,

thereby affected: *State v. Southern Ry. Co.*, 119 N. C. 814, 56 Am. St. Rep. 689, 25 S. E. 862; *Norfolk etc. Ry. Co. v. Commonwealth*, 93 Va. 749, 57 Am. St. Rep. 827, 24 S. E. 837; monographic note to *People v. Wemple*, 27 Am. St. Rep. 547-568. A statute subjecting common carriers to a penalty for failing or refusing to pay a claim for loss or damage to any article intrusted to them for transportation, within sixty days from the time such claim is made, is not an unlawful interference with interstate commerce: *Porter v. Charleston etc. Ry. Co.*, 63 S. C. 169, ante, p. 670, 41 S. E. 108.

McLAUGHLIN v. BRADDY.

[63 S. C. 433, 41 S. E. 523.]

NEGOTIABLE INSTRUMENTS—Effect of Indorsement in Blank by Attorney in Fact.—Whether a note is a common promissory note or a note under seal, the effect of its indorsement in blank by the payee, through his attorney in fact, is to transfer the legal title to the transferee. (p. 682.)

NEGOTIABLE INSTRUMENTS—Effect of Seal.—If a person signs a note at the bottom opposite the printed word "seal" before delivery, as to him the note is sealed and non-negotiable, and he may set up the defenses of fraud and failure of consideration as against the holder for value before maturity. (p. 683.)

NEGOTIABLE INSTRUMENTS—Absence of Seal—Defenses. If a note has been signed and sealed by one person and another signs his name under that of the first signer, or on the back of the note, but not opposite to his seal, making no seal of his own, and nothing appearing to indicate an intention to make a seal, his seal cannot be inferred from his signature alone, and as to him the note is negotiable, and he cannot set up the defenses of fraud and want of consideration as against the holder for value before maturity. (pp. 683, 684.)

J. F. Izlar and Grace & Herbert, for the appellant.

L. F. Youmans and Raysor & Summers, for the appellee.

435 JONES, J. This action was upon a note as follows:

"\$135. St. Mathews, S. C., 6, 3, 1898.

"On or before the 15th day of October, 1898, I promise to pay to the order of Harvey W. Miller, one hundred and thirty-five dollars, for value received, negotiable and payable without defalcation at St. Mathews Savings Bank, St. Mathews, S. C.

"T. B. BRADDY. (Seal)

"(Seal) This note is given as part payment on three hundred 'Farmer's Accountants.'"

On the back of the note appears the name "D. Braddy," also 436 "Harvey W. Miller, by J. E. Blythe, atty. in fact." The answer of the defendant, besides a general denial, sets up fail-

ure of consideration and alleged fraud. The appeal comes from a judgment in favor of plaintiffs against the defendants for the amount claimed. At the conclusion of plaintiff's testimony a motion for nonsuit was made upon the following grounds: "1. That a power of attorney to assign and transfer does not authorize an agent to sell or discount; 2. That a power of attorney to assign or transfer a sealed paper, which is in the nature of a bond or obligation, must be under seal; 3. That a mere indorsement in blank is not sufficient to transfer the title to a sealed note."

In overruling the motion, the court, among other matters, held that the note in question was not a sealed note, but a negotiable promissory note; that the presumption of non-negotiability arising from the presence of the word "(Seal)" after the signature was overcome by the terms of the note, declaring it to be "negotiable and payable without defalcation."

As there is no exception in reference to the ruling of the court as to the first and second grounds mentioned above, they go out of this appeal. The exception to the refusal of the nonsuit is as follows: "1. Because his honor erred in refusing the defendants' motion for a nonsuit, in that he held that the note sued on was negotiable, notwithstanding the word 'seal,' and that the same could be assigned and transferred by indorsement in blank and thereby ruling out the defenses of failure of consideration and fraud, and all the testimony relating thereto." We see no error in the refusal of nonsuit, although, as shall hereafter appear, we may not agree with the circuit court that the note is a negotiable promissory note as to the defendant, T. B. Braddy. Whether the note was a promissory note or a note under seal, the effect of the indorsement in blank by the payee, through his attorney in fact, was to transfer the legal ⁴³⁷ title to the plaintiffs, to whom the note with such indorsement was sold and delivered: Tryon v. De Hay, 7 Rich. 12; Brown v. McWhite, 30 S. C. 358, 9 S. E. 277.

The real question in the case arises on exceptions to the rulings of the court on trial and to the charge to the jury, by which defendant was prevented from showing the defenses of failure of consideration and fraud, because in the view of the court the note was a negotiable promissory note, against which such defenses were not available, if the plaintiffs were bona fide holders for value before maturity without notice of such matters alleged in defense. Is the note a sealed note? We think so, in so far as T. B. Braddy is concerned. The word and sign "(Seal)" appears after his signature. This manifests his intention to adopt

such as his seal, even though there were no words in the body of the note as "witness my hand and seal," or the like, to indicate that it was intended to be under seal. The characters "(Seal)" were not made by T. B. Braddy, as the note was prepared by filling out a printed form with "(Seal)" printed thereon, but the fact that he signed his name opposite such characters was an adoption of such characters according to their import, and they bear on their face evidence that they represented the seal. In the case of *O'Cain v. O'Cain*, 1 Strob. 405, Wardlaw, J., said: "For a seal, the letters 'L. S.,' with a circumflex, are usually adopted; and where a party who signs does himself make these marks plainly after his name, or with his name before them plainly made on the paper, they furnish of themselves, even without the *opposui sigillum*, evidence of his intention to do what they usually denote, to seal." And in the case of *Rolph v. Gist*, 4 McCord, 271, the court, by Judge Nott, said: "When a person makes use of a well-known symbol or cipher which has usually been employed for the purpose of a seal and no other, the court will presume that it was annexed for that purpose." In the case of *Giles v. Mauldin*, 7 Rich. 11, the note sued on was upon a printed form, with the blanks filled up in writing. There were no words in the body of the ⁴³⁸ note as "witness my hand and seal," or "signed, sealed and delivered," to indicate that it was intended to be under seal. The note was payable to the plaintiff "or bearer," but a printed "(L. S.)" appeared opposite defendant's signature. The court of common pleas held that the note was a sealed note, and the court of appeals refused to disturb the judgment. Among the cases from other states to the same effect may be cited *Brown v. Jordhal*, 32 Minn. 135, 50 Am. Rep. 561, 19 N. W. 650; *Osborne v. Hubbard*, 20 Or. 318, 25 Pac. 1021.

Having reached the conclusion that the note as executed by T. B. Braddy was under seal, it must follow, as to him, that it is not a negotiable promissory note under the law-merchant, for it is essential to the negotiable character of a note that it be unsealed: *Foster v. Floyd*, 4 McCord, 159; *Parker v. Duke*, 2 McCord, 380; *Patterson v. Rabb*, 38 S. C. 148, 17 S. E. 463; 4 Ency. of Law, 2d ed., 123. The case of *Central Nat. Bank v. Charlotte etc. R. R. Co.*, 5 S. C. 156, 22 Am. Rep. 12, does not conflict with this view, for that case was dealing with the seal of a corporation, and the court held that the seal of a corporation was equally appropriate as a means of evidencing its assent to be bound by a simple contract or by a specialty. The presence of a seal does not of itself render the corporation's in-

strument non-negotiable: 4 Ency. of Law, 2 ed., 124. Section 133 of the Code of Civil Procedure provides: "In a case of an assignment of a thing in action, the action of the assignee shall be without prejudice to any setoff or other defense existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due." It was error, therefore, to shut off the defendant, T. B. Braddy, from establishing his alleged defenses.

As to D. Braddy, no seal is attached to his signature, and there was no evidence aliunde that he intended to adopt any seal. The case of *O'Cain v. O'Cain*, 1 Strob. 402, shows that where a note has been signed and sealed by one person, and another signs his name under that of the first signer, but not opposite ⁴³⁹ to his seal, making no seal of his own, and nothing being on the face of the paper sufficiently indicative of the intention to seal, and there being no evidence aliunde of intention to seal, the seal of the second person cannot be inferred from his signature alone. The case of *Cockrell v. Milling*, 1 Strob. 444, shows that two may sign the same promise to pay money, one with a seal and the other without, and if the promise is several, both will be bound according to the legal effect of their respective obligations. The evidence in this case was that D. Braddy signed the note by indorsement in blank before its delivery to the payor. This made him a maker of the note, under the authorities in this state: *Stoney v. Beaubien*, 2 McMull. 319, 39 Am. Dec. 128; *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188; *Johnston v. McDonald*, 41 S. C. 83, 19 S. E. 65. D. Braddy, therefore, having signed without making or adopting a seal, is liable as the maker of a negotiable promissory note, and as to him the alleged defenses were not available, and the ruling and charge of the court not erroneous. This may seem technical, but such is the law-merchant.

The judgment of the circuit court as to the defendant D. Braddy is affirmed, but as to the defendant T. B. Braddy it is reversed, and the case as to him is remanded for a new trial.

Negotiable Instruments.—A Seal is no objection to the negotiability of an instrument, according to some authorities: *Clapp v. County of Cedar*, 5 Iowa, 15, 68 Am. Dec. 678. Other authorities consider a sealed note non-negotiable: *Conine v. Junction etc. R. R. Co.*, 3 Houst. (Del.) 288, 89 Am. Dec. 230; *MacKay v. St. Mary's Church*, 15 R. I. 121, 2 Am. St. Rep. 881, 23 Atl. 108. Thus, it is held that an instrument in the form of a negotiable note, but with the word "[sealed]," the statutory substitute for a common-law seal, following the maker's signature, is sealed and non-negotiable: *Brown v. Jordhal*, 32 Minn. 135, 50 Am. Rep. 560, 19 N. W. 650.

CASES
IN THE
SUPREME COURT
OF
UTAH.

AUERBACH v. SALT LAKE COUNTY.

[23 Utah, 105, 63 Pac. 907.]

COUNTY OFFICERS—Acts of.—When the Statute is not Followed, the acts of a county court or of county commissioners are without force and effect. In such an event, however, it does not follow that under no circumstances can a liability be created. (p. 687.)

COUNTY WARRANTS—Fraud in—Innocent Holder.—A county cannot, after an opportunity to rescind, retain and use goods fraudulently sold to it, and refuse to pay their value to the innocent holder of a warrant given in payment for them. (pp. 687, 689.)

COUNTY WARRANTS—Evidence of Validity.—In an action on a county warrant, defended on the ground of fraud in its inception, the proceedings of the court when it was authorized, and a bond received as security for the delivery of goods for which it was issued, are admissible in evidence. (pp. 688, 689.)

COUNTY WARRANTS—Fraud in—Priority Among Holders. If county warrants are fraudulently issued in excess of the value of goods received, a recovery without deduction may be had on the first warrant issued, registered, and presented for payment, it being in the hands of an innocent holder and less in amount than the actual value of the goods. (pp. 688, 690.)

APPEAL.—An Objection that a Claim Against a County was not presented to the proper officers and acted upon as required by statute, before suing thereon, cannot be raised for the first time on appeal. (p. 690.)

This was an action to recover fifteen thousand dollars, a sum represented by a county warrant drawn by Salt Lake County in favor of A. H. Andrews & Company, and transferred by such company to F. Auerbach & Brother, of which firm the plaintiff was the surviving partner. It was found by the trial court that the selectmen and the probate judge constituted the county court; that the selectmen, without authority from the county

court, and without advertising or receiving bids for furniture for the city and county building, made contracts in the months of March and May with A. H. Andrews & Company for supplying such furniture; that these contracts were the result of an agreement entered into by some of the selectmen in consideration of a bribe paid them; that the warrant in question was issued in part payment of the furniture, and was presented for payment and registration; that it was the first warrant issued for the furniture; that Auerbach & Brother bought it in ignorance of the fraud and bribery, and paid fourteen thousand seven hundred dollars therefor; that the furniture was worth twenty-seven thousand dollars; that the warrants issued to Andrews & Company in payment were transferred to divers parties; and that the successors of the selectmen repudiated the warrants, directed the county treasurer not to pay them, but at no time offered to return the furniture.

The market value of the furniture was only twenty-seven thousand dollars. As an affirmative defense, however, it was alleged that the contract price was fifty-four thousand nine hundred and seventy-three dollars and eighty-five cents, and that warrants to that amount were issued in payment. The defendant's counterclaim prayed that he have deducted from any judgment that the plaintiff might recover the sum of seven thousand six hundred and forty dollars, being such proportion of the damages suffered by reason of the fraud, which damages were alleged to be twenty-eight thousand dollars, as plaintiff's warrant of fifteen thousand dollars bore to the sum total of warrants issued. There was a judgment of fourteen thousand seven hundred dollars, with interest. This appeal challenges its correctness.

Graham F. Putnam, Ray Van Cott, and W. T. Gunter, for the appellant.

Dickson, Ellis & Ellis and Booth, Lee & Ritchie, for the respondent.

114 BARTCH, C. J. The appellant insists that error was committed in rendering this judgment; that when the court found that the warrant in dispute was void, it followed that the judgment must be for the defendant; and that the only way a county can be made liable at all is expressly by contract made, and liability created, in the manner prescribed by statute, and that no liability as to a county can be implied.

It is true the county court was wholly a creature of statute, and that, as a general proposition, the acts of such a court and of a board of county commissioners are void and without force or effect when the statute is not pursued. This is so well settled as to need no citation of authorities. It does not follow, however, that under no circumstances can a liability be created when the statute is not in all respects pursued, or when some of the members of the county court are guilty of fraud with reference to some part of a transaction. Conceding that the contracts of March and May, tainted not only with the most reprehensible, but with criminal, conduct and acts of some members of the county court, were void, still it is not a necessary sequence that, by subsequent proceedings and acts of that court, of which some of the members were acting in good faith, and were innocent of the fraud and corruption, in relation to the furniture—the same subject matter of the fraudulent transaction—a liability on the part of the county could not be created in favor of an innocent holder of a warrant. We apprehend that the creation of such a liability by the court was possible notwithstanding the fraudulent contracts to which some of the ¹¹⁵ members of the court were parties, and it therefore becomes important to look into the subsequent proceedings and acts of the county officers.

From the evidence it appears that at a meeting of the county court held on June 19, 1894, at which all the members were present, a resolution was adopted which reads: "Resolved, that the county clerk be, and he is hereby, directed to draw a warrant in favor of A. H. Andrews & Company of Chicago, for the sum of fifteen thousand dollars, and deliver the same to M. Hayken, as agent of said A. H. Andrews & Company, upon the execution and delivery to said clerk of the indemnity bond duly signed by the said A. H. Andrews & Company, as principal, and by Frank Knox, E. W. Duncan, and G. S. Holmes, as sureties, and upon the filing by the said clerk of the documentary authority of said Hayken to sign said bond on behalf of said A. H. Andrews & Company."

In accordance with this resolution the undertaking therein mentioned was filed, and in the obligatory part thereof it was stated: "Now, therefore, if the said A. H. Andrews & Company shall at their own expense and risk transport to and deliver in the said building the said furniture, fittings and appliances mentioned and specified in the said contract, to the value of fifteen thousand dollars, in the specifications or schedules there-

in referred to, and set up the same in said building as required in said contract as soon as they or their agent shall be notified so to do by the architect of said building, or the county court of said county, and shall in all respects perform all the things in said contract required and stipulated to be by them performed, to the value of fifteen thousand dollars, then this obligation shall be void; otherwise to remain in full force and effect."

Notwithstanding the fact that the minutes of the court showing the passage of this resolution and the bond were introduced in evidence over the objections of the appellant, we are of ¹¹⁶ the opinion that, under the pleadings, they were properly admitted as tending to throw light on the whole transaction, and to show what steps were taken to secure the delivery of the furniture which, the evidence shows, had been completed and was ready for shipment. Whether this action of the county court, and the compliance therewith by Andrews & Company created a valid contract, and whether it authorized the issuance of the warrant, or whether the warrant issued in pursuance thereof is absolutely void, are questions which, from the view we have taken of the case, we do not deem important or necessary to decide. It is doubtless true and may be admitted that the appellant could have rescinded all these transactions relating to the purchase of the furniture, the last one included, because the resolution and bond refer to the former fraudulent contracts, but it has not seen fit to do so. On the contrary, it received and accepted the furniture, pursuant to the contract of June 19th, had it set up in the city and county building, and ever since has used and exercised ownership over the same, and has never attempted to rescind the contract, or returned or offered to return the furniture, or paid or offered to pay to Andrews & Company, or Auerbach & Brother, or the plaintiff, who must be regarded as the equitable assignee of Andrews & Company to the extent of the amount paid for the warrant, any part of the actual value of the furniture, although in its counterclaim the defendant admits that the actual market value of the furniture was twenty-seven thousand dollars, and simply asks for a deduction from the amount of plaintiff's claim of seven thousand six hundred and forty dollars, thereby admitting that the balance of the fifteen thousand dollars, at least, was due the plaintiff. Even after the change in the personnel of the county court, when the same was composed of members none of whom were parties to the corrupt contracts of March

and May, and after they had discovered the fraud, no effort whatever was made to rescind the ¹¹⁷ contracts, or to return the goods, or pay the actual value therefor.

Under such circumstances the defendant cannot be permitted to retain and use the goods, and at the same time refuse to pay the fair market value therefor to an innocent holder of a warrant.

In *Argenti v. City of San Francisco*, 16 Cal. 256, Mr. Justice Cope, delivering the opinion of the court, said: "From an examination of the authorities, it is evident that the doctrine contended for by the counsel for the city cannot be maintained. The theory is, that a municipal corporation can only be bound by a contract to which it has expressly assented, and that such a corporation is exempt from the operation of the rules which relate to and govern the contracts and liabilities of individuals. We readily admit that the powers of a corporation are derived solely from the act creating it; and that, as a general rule, these powers must be exercised in the particular mode pointed out by the charter. It does not follow, however, that even a want of authority is, in all cases, a sufficient test of the exemption of a corporation from liability in matters of contract."

In the same case, Mr. Justice Field, concurring in the judgment announced by the court, said: "If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability on an implied contract, and it is no answer to a claim resting upon a contract of ¹¹⁸ this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of fifty thousand dollars prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would indeed be a reproach to the law if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness. In reference to money or

other property, it is not difficult to determine, in any particular case, whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her, and when it is property other than money, it must have been used by her, or be under her control": 1 Dillon on Municipal Corporations, 4th ed., secs. 460, 461; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777.

The deduction above referred to was doubtless asked on the theory that there are other warrant holders, and that the plaintiff should share a proportionate loss occasioned by the fraudulent excess charged for the furniture, as per the contracts of March and May. The answer to this is, that it is admitted that the warrant in dispute was the first one issued for any of the furniture, the first presented for payment, and the first one registered. In the absence of a rescission of the contract, the liability of the county became complete, for the claim represented by the warrant, the moment furniture had been delivered and accepted of the fair market value of fifteen thousand dollars, and as we have seen, it is admitted that twenty-seven thousand dollars' worth was delivered, accepted and ever since used by the county. All the holders of subsequent warrants must, therefore, be presumed to have had notice of the prior claims for which the warrant in dispute was issued, as the facts in relation thereto were matters of record. Under these circumstances the maxim, "*Qui prior ¹¹⁹ est tempore potior est jure*," controls. This is so even though the equities between all the holders are equal: 2 Pomeroy's Equity Jurisprudence, secs. 693, 695; Board of Education v. Pressed Brick Co., 13 Utah, 211, 44 Pac. 709; Price v. Elmbank, 72 Fed. 610; In re Gillespie, 15 Fed. 734; In re Mahaska Coal Co., 95 Iowa, 456, 64 N. W. 405; Shirk v. Pulaski County, 4 Dill. 209, Fed Cas. No. 12,794.

The appellant further contends that, even if the respondent is entitled to recover the reasonable value of the goods, he cannot recover in this action, because the complaint fails to allege that a claim duly itemized and verified had been presented to the county court, or board of county commissioners, and by them rejected before suit was instituted. This point, as appears, was made for the first time in the appellate court, and therefore cannot avail the appellant, there being no statute in this state which expressly prohibits the bringing of an action on any claim before it has been so presented and acted upon. Such an objection simply goes in abatement of the ac-

tion, and, to have effect, must be urged by proper plea, or in some appropriate manner in the trial court, or the objection will be regarded as waived.

In *Jaquish v. Town of Ithaca*, 36 Wis. 108, where a similar question was raised, Mr. Justice Lyon, speaking for the court, said: "Without deciding whether the claim should have been presented for audit to the town board before an action upon it can be maintained, it is sufficient for the purposes of the case to say that this objection, which is made for the first time in this court, comes too late to be available to the defendant. Conceding the objection, if taken at the proper time, to be a valid one, it only goes in abatement of the action, and should have been made on the trial, either by motion for a nonsuit or in some other appropriate manner": Gould on Pleading, c. 5, p. 284; *Brown v. Cayuga etc. Ry. Co.*, 12 N. Y. 486.

We are of the opinion that in the second count of the ¹²⁰ complaint the allegations, in the absence of any special plea attacking their sufficiency, cannot be successfully assailed after judgment.

Nor do we think the appellant's objection to the allowance of interest from February, 1895, is well taken. The trial court found that the members of the county court "commenced an investigation with the result that, as early as February 15, 1895," they "became convinced" that the contracts were fraudulent and void, and determined to contest the payment of the warrants issued thereunder, and "also elected to retain the furniture," and we cannot say that there is no proof to support such finding, and therefore cannot disturb it. Nor under these circumstances can we interfere with the allowance of interest from that date.

Other questions have been presented, but from the view we have taken of the case further discussion is not deemed important. We find no reversible error in the record.

The judgment is affirmed, with costs.

Miner and Baskin, JJ., concur.

The Doctrine of Ultra Vires in relation to the contracts of private corporations is considered in the monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180. The doctrine applies with greater strictness to municipal bodies than to private corporations, and in general a municipality is not bound by a contract when there was no authority to make it: *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333; *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28; *Winchester v. Redmond*, 93 Va. 711, 57 Am. St. Rep. 822, 25 S. E. 1001.

Municipal Warrants.—The character of municipal warrants, whether or not negotiable, and the rights of bona fide holders, are considered in *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, 79 Am. St. Rep. 953, 61 Pac. 158; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 27, 56 Am. St. Rep. 828, 23 S. E. 681; *Furgeson v. Staples*, 82 Me. 159, 17 Am. St. Rep. 470, 19 Atl. 158; *Willis v. French*, 84 Me. 593, 30 Am. St. Rep. 416, 24 Atl. 1010.

Sale.—*The Right to Rescind* a contract of sale must be exercised promptly and in good faith. It may be waived by retaining and using the goods: *Waeber v. Talbot*, 167 N. Y. 48, 82 Am. St. Rep. 712, 60 N. E. 288; *Underwood v. Wolf*, 131 Ill. 425, 19 Am. St. Rep. 40, 23 N. E. 598.

GORRINGE v. REED.

[23 Utah, 120, 63 Pac. 902.]

EQUITY may Grant Relief from Unlawful Transactions, if public policy so requires, when the parties, though in delicto, are not in *pari delicto*. (p. 694.)

EQUITY may Grant Relief from an Agreement to Stifle a Criminal Prosecution, when the public good requires it, although the parties are in *pari delicto*. (p. 695.)

CONTRACTS.—*The Very Existence of a Contract Requires* that the minds of the parties meet, and that it be executed freely and voluntarily by all. (p. 696.)

DURESS—*Threat of Imprisonment.*—**A Wife** may avoid a contract obtained by threats of imprisoning her husband, and it is of no consequence whether the threat is of lawful or unlawful imprisonment. (pp. 695, 699.)

This was a suit in equity to set aside a deed executed by the plaintiff to the defendant. It was alleged that the deed was entirely without consideration, and was executed under duress caused by threats made by the defendant and his brother, J. G. Reed, acting for him, to prosecute and imprison the plaintiff's husband for grand larceny. It appeared that at the time of the transaction the defendant and his brother belonged to the firm of Reed Brothers, harness dealers. The plaintiff's husband, while in the employ of the firm, purloined goods from it at various times. It did not appear that the plaintiff was aware of the pilfering while it was going on, but she was informed thereof before giving the deed. Her husband was charged with stealing a few dollars' worth of leather, and plead guilty to petit larceny. J. G. Reed was present, and asked to have the case dismissed, but a fine of twenty-five dollars was imposed.

At the close of the plaintiff's testimony the court granted a nonsuit on the ground that none of the material allegations of the complaint were sustained; that the plaintiff admitted that she executed the deed for the purpose of compounding a felony; and that she was therefore in *pari delicto* with the grantee in the deed. Judgment was entered accordingly, and from it this appeal was taken.

A. J. Weber and Thomas Maloney, for the appellant.

Richards & Allison, for the respondent.

129 BARTCH, C. J. The appellant insists that the court erred in sustaining the motion for nonsuit, and that it is against public policy, good morals and conscience to permit a transaction, which is the result of duress, to stand. It is urged that, even if the parties were in *pari delicto*, the appellant is comparatively the more innocent, and that in furtherance of justice and sound public policy she ought to be granted full affirmative relief. The respondent maintains that the appellant is not entitled to the interposition of a court of equity; that affirmative aid should be refused, and the parties to the illegal transaction left by the court where it found them; that the same principle controls whether the illegality is merely *malum prohibitum*, being in contravention of statute, or *malum in se*, as being contrary to public policy or good morals; and that contracts only which are made under fear of unlawful imprisonment can be avoided for duress. We are aware that some cases tend to support the contention of the respondent. Among them are *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Knapp v. Hyde*, 60 Barb. 80; *Bodine v. Morgan*, 37 N. J. Eq. 426; *Allison v. Hess*, 28 Iowa, 388; *Landa v. Obert*, 45 Tex. 539.

Such seems to be the trend of some of the earlier decisions, but the more recent adjudications, in cases like the one at bar, support the contention of the appellant. "It appears formerly to have been the rule that the imprisonment must have been unlawful, or, if lawful, undue force must have been used, or **130** the party made to endure unnecessary privation, to avoid which and to obtain his liberty he made the contract, while the mere fact of imprisonment was not deemed sufficient to avoid an agreement obtained through the medium thereof, if the party was in proper custody under the regular process of a court of competent jurisdiction. Again, the earlier cases made some

fine and subtle distinctions in regard to the character of the threats which procured the execution of the contract; but as civilization has advanced the law has tended much more strongly than it formerly did to overthrow everything which is built on violence or fraud, and now, as a rule, all contracts procured by threats or imprisonment and the fear of injury to life, limb or property may be avoided on the ground of duress, whether on the part of the person to whom the promise or obligation is made or on that of his agent. The reason of this is obvious; for in such case there is nothing but the form of a contract without the substance, and, wanting the voluntary assent of the party to be bound by it, the law will refuse to uphold it": 2 Warvelle on Vendors, 864.

It is no doubt true, as a general proposition, that a court of equity, acting on the maxim, "*In pari delicto potior est conditio defendentis et possidentis*," will not interpose to aid parties who are concerned in unlawful transactions or agreements, but where public policy requires relief to be given, and when the parties, though in delicto, are not in *pari delicto*, as when, at the time of the transaction, the complainant was under undue influence, hardship or oppression or great inequality of condition or age existed, and acted involuntarily, the maxim does not apply: 1 Story's Equity Jurisprudence, secs. 288, 300.

The reason is that, in such cases, the public interests and justice require relief to be given, even though the complaint be by one who is *particeps criminis*. And in this class of cases a court of equity may grant relief, not only by canceling an ¹³¹ instrument, or setting aside an agreement or other transaction, but also, in a proper case, by compelling money paid under it to be refunded. All contracts and transactions, *contra bonos mores*, are unlawful and void in equity, and with a very few exceptions at common law. This is so as to agreements or transactions, executed or executory, entered into upon the consideration of the compounding of a felony, the forbearance to prosecute for a crime, abandonment of a pending criminal prosecution, or which directly or indirectly control or prevent the due administration of justice. When the object is to stifle a criminal prosecution, such an agreement or transaction is void, and although the parties are in *pari delicto*, equity may grant relief when the public good demands it. "Even where the contracting parties are in *pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for

relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity may aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted, include the class of contracts which are intrinsically contrary to public policy—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts, in which from their particular circumstances, incidents and collateral motives of public policy require relief”: 2 Pomeroy's Equity Jurisprudence, 941, 936.

In the case at bar, from the evidence which for the purpose of deciding the correctness of the judgment of nonsuit we ¹³² must assume to be true, it appears that the complainant received no consideration for the property which she conveyed by deed to the defendant. Her husband admitted that he had committed the crime of larceny, and the defendant or his agent, after the arrest of the husband, explained to her that it was a serious case, a “penitentiary offense,” and then when implored by her to help her husband, for the sake of herself and children, and to save them from want and disgrace, the defendant left the matter to his agent. She was then asked whether she had any property or money, and, upon replying that she owned the real estate in question herein, was told that if she would execute a deed to the defendant for that property they would make matters all right. Expressing her unwillingness to do this, she was given the choice to sign the deed or have her husband sent “to the penitentiary for from one and a half to five years.” Frightened, and believing that her husband could be imprisoned in the penitentiary, and that her execution of the deed would save herself and family from want and disgrace, she consented to and did execute and deliver the instrument of conveyance.

Without further reference in detail, a fair result of the evidence, if it is in fact true, shows that the deed was executed and delivered under the influence felt by the grantor and exercised by the grantee, and that the result of the discovery of the criminal act, for which the wife was not liable, and the fear of the criminal prosecution and imprisonment of her husband, were

used by the defendant or his agent to induce her to execute and deliver the deed. The evidence thus shows an attempt to gain an advantage or benefit from an influence improperly exerted, and indicates the use of the criminal process of a court for private and personal ends.

The important question of law here involved, therefore, is whether one who has discovered the commission of a crime ¹³³ and has caused the arrest of the perpetrator, and who, by threats of prosecution and imprisonment, has overcome the will of the wife of the perpetrator, and induced her to execute a deed which she would not have willingly executed and delivered, can hold the property so conveyed, if the wife afterward attempts to avoid the deed and have it canceled on the ground of duress. It has sometimes been held that threats of unlawful imprisonment only can constitute duress, and some of the definitions of duress per minas are perhaps not broad enough to include threats of lawful imprisonment, but at present the rule has a broader application. "It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily": *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

The very existence of a contract requires that the minds of the parties meet, and that it be executed freely and voluntarily by all the contracting parties. If, then, in a case like the one shown by the evidence herein, one of the parties acts under constraint, induced by the other, and signs the instrument without voluntary assent to it, the party who exerted the improper influence can take no advantage of the contract. The real question in such case is not whether the threats relied upon as constituting duress were of lawful or unlawful imprisonment, but whether they were of imprisonment which would be unlawful respecting the conduct of him who threatened and ¹³⁴ sought to obtain a contract by use of the threats. Such imprisonment, resulting from the execution of threats made for

the purpose of securing a contract or a conveyance of property, may be lawful with respect to the public or public authorities, but unlawful with respect to him who thus, for his own private benefit, made use of the criminal process of the court provided for the prosecution of crime and the protection of the public. One who, under circumstances as now disclosed in this case, makes use of the criminal process of the court for the purpose of overcoming the will of another to secure an advantage to himself, is not in a position to obtain and hold the fruits of a contract, whether executed or executory, so obtained, on the ground that both parties were in *pari delicto*, and that in equity the court will leave them where it finds them. Under the weight of recent authority, at least, such parties, under such circumstances, cannot be looked upon as equally at fault, although they are both guilty of a wrong. The inequality of their situation, the one exacting a deed to property which the other is compelled to execute and deliver against her will in order to save her husband from imprisonment in the penitentiary, and herself and children from disgrace and ruin, taints the transaction and renders voidable the instrument obtained under the influence of her fears. This is so because she was not acting as a free agent. The evidence does not show that the conveyance was the result of her own volition, but of that of another—in reality not her contract, but another's, and, in such case there is no reason why she should be held bound by the instrument. If, as indicated by the evidence now before us, her main and inspiring purpose was the release of her husband from the consequences of his crime and to preserve the standing of herself and family in society, if such was the consideration operating in her mind when she signed the deed, a court will not be justified in upholding the transaction.

¹³⁵ In *Williams v. Bayley*, L. R. 1 Eng. & I. App. Cas. (H. L.) 200, a son carried to bankers, of whom he and his father were both customers, certain promissory notes with his father's name upon them as indorser. The indorsements were forgeries. The forgery was afterward discovered; the son did not deny it; the bankers insisted, though without any direct threat of prosecution or imprisonment, on a settlement, to which the father was to be a party. At a meeting at which all the parties, including the father, were present, the banker's solicitor said it was "a serious matter," and the father's solicitor added, "a case of transportation for life"; finally the father executed an agreement to make an equitable mortgage

of his property. The notes, with the forged indorsements, were then delivered up to him. Lord Westbury, holding the agreement invalid, in the course of his opinion, said: "It is perfectly clear that they did not pretend that the father was liable. What remained then as a motive for the father? The only motive to induce him to adopt the debt was the hope that by so doing he would relieve his son from the inevitable consequences of his crime. The question, therefore, my lords, is whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe, or ought to be safe, who takes a security for the debt of a felon from the father of the felon under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether **136** taken away from a father who is brought into the situation of either refusing and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation."

Benedict v. Roone, 106 Mich. 378, 64 N. W. 193, is a case in many respects quite similar to the one at bar. There the husband of the complainant embezzled funds of his employers. The husband's conduct was disclosed to the wife by the employers' attorney, who advised her that it constituted a criminal offense, and on the same day she was informed by one of the employers that he must have security or the money, or "there are the papers," and "I shall go on with the proceedings." Thereupon the wife executed a mortgage to the employers upon her individual property for the amount of her husband's defalcation. In affirming a decree setting aside the mortgage as having been procured by duress and undue influence, Mr. Justice Grant, delivering the opinion of the court, said: "If the court were to be governed alone by the words used to her by them, the position of the defendants might be sustained; but we cannot ignore the conclusion that the conduct of her husband was suddenly disclosed to her, that she understood that he had committed a crime, and that the papers referred to by

Mr. Weir as lying upon the table were prepared as the basis of a criminal prosecution. We think it clear that she gave the mortgage under an implied threat of criminal prosecution. If they so meant it, and she so understood it, and for that reason gave the mortgage, it was obtained by duress and undue influence, just as certainly as though an express threat had been made."

So in *Giddings v. Iowa Sav. Bank*, 104 Iowa, 676, 74 N. W. 21, it was said: "Where the fears or affections of a wife are worked upon through threats made against her husband, and she is induced thereby against her will to convey her property to ¹³⁷ secure his debt, there is duress as to her, even though the debt was valid, and the threat of lawful prosecution for a crime that had in fact been committed by the husband."

In *Adams v. Irving Nat. Bank*, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7, it was said: "The rule is firmly established that in relation to husband and wife or parent and child each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment": 6 Am. & Eng. Ency. of Law, 416, 417; 10 Am. & Eng. Ency. of Law, 324-327; 2 *Pomeroy's Equity Jurisprudence*, 942; 1 *Story's Equity Jurisprudence*, secs. 239, 300; *Hensinger v. Dyer*, 147 Mo. 219, 48 S. W. 912; *Town of Sharon v. Gager*, 46 Conn. 189; *Meech v. Lee*, 82 Mich. 274, 46 N. W. 383; *Heaton v. Bank*, 59 Kan. 281, 52 Pac. 876; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Bentley v. Robinson*, 117 Mich. 691, 76 N. W. 146; *Hargraves v. Korcek*, 44 Neb. 660, 62 N. W. 1086; *Davis v. London etc. Marine Ins. Co.*, L. R. 8 Ch. D. 469; *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068; *Thompson v. Niggley*, 53 Kan. 664, 35 Pac. 290; *Osborne v. Williams*, 18 Ves. Jr. 379; *Gohegan v. Leach*, 24 Iowa, 509; *Biendorff v. Kaufman*, 41 Neb. 824, 60 N. W. 101; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *McMahon v. Smith*, 47 Conn. 221, 36 Am. Rep. 67; *Tapley v. Tapley*, 10 Minn. 448 (360), 88 Am. Dec. 76; *McCormick Harvesting Machine Co. v. Hamilton*, 73 Wis. 486, 41 N. W. 727; *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 13 Atl. 8; *Holman v. Johnson*, 1 Cowp. 341; *Haynes v. Rudd*, 30 Hun, 237; *Claridge v. Hoare*, 14 Ves. Jr. 59.

We are of the opinion that the plaintiff's testimony is of such a character as to require the defendant to put in his de-

fense, and that the court erred in granting the motion for and entering the judgment of nonsuit.

The case must be reversed, with costs, and the cause remanded with instructions to the court below to set aside the judgment of nonsuit and proceed in accordance herewith. It is so ordered.

Baskin, J., concurs.

138 MINER, J. It is not absolutely clear from the testimony that plaintiff participated in the crime of stealing from the store of the defendant, although it is apparent that she endeavored to conceal the crime after its discovery. It also appears that when the officers were seeking for the stolen property at her house she told her husband, "Now, Joe, be sure and not give up that stuff you bought at Salt Lake." The officers found nineteen bags of stolen harness material in a room in plaintiff's house, which was kept locked. Only these goods so found were returned to the defendant, although the husband had been pilfering from the store for eight months, and the estimated loss claimed was eight hundred dollars.

The plaintiff gave testimony tending to show that she executed the deed under duress, and by means of threats to prosecute her husband and send him to the penitentiary if she did not execute it. Under these circumstances I concur in the judgment of reversal, and in granting a new trial.

Duress.—*Threats to Prosecute* a man for a criminal offense, unless his wife executes a mortgage on her separate property to secure his debt, constitute duress and avoid her mortgage thereby obtained: *Mack v. Prang*, 104 Wis. 1, 79 N. W. 770, 76 Am. St. Rep. 848, and cases cited in the cross-reference note thereto.

ELLIOT v. WHITMORE.

[23 Utah, 342, 65 Pac. 70.]

APPEAL.—The Supreme Court has Power to Review all questions of law and fact in equity cases, but it will not disturb the findings of the lower court, unless they are so erroneous as to demonstrate oversight or mistake materially affecting the appellant's rights. (p. 703.)

WATERS.—The Extent of an Appropriation of Water is determined by the reasonable necessity for its use, the intention of the appropriator followed by reasonable diligence in executing such intent, and the purpose of the appropriation. (p. 704.)

WATERS.—A Settler is not Confined to an Appropriation of water simply for the amount of land irrigated during the first year of its diversion. (p. 704.)

ESTOPPEL.—A Representation as to the Future can operate as an estoppel only when it relates to an intended abandonment of an existing right. (p. 705.)

Action to determine the rights to the waters of Grassy Trail creek, and to enjoin the defendants from interfering with the water rights of the plaintiff during the irrigation season. The defendants occupied their land in 1878, and in the spring of 1879 made a ditch from the creek and diverted water to the upper part of their land, upon which they raised a crop. During the following winter they cleared more land, and in the spring of 1880 enlarged and straightened their ditch, bringing more land under cultivation. The same year the plaintiff began to occupy his land for sheep herding, using some of it near the Big Springs for meadow. In 1881 the defendants cleared more land and extended their area of irrigation. That same year the plaintiff tried to irrigate his meadows from the springs; but as they watered only a part of the land, he constructed and completed in the fall a small ditch from the creek, and diverted some water through it after the defendants had used such water. During the winter following the defendants cleared more land, and in the spring of 1882 extended their ditch thereto, and that year again extended their area of cultivation and irrigation. That year the plaintiff did some work on his ditch, and once diverted water to his meadow, but otherwise made no use of the water. From 1883 to 1885 the defendants continued to bring more land under cultivation and irrigation. During 1884 the plaintiff enlarged his ditch and ran water onto his pasture.

In the spring of 1885 the parties held a conversation to the effect that the defendants did not intend increasing their cultivation, and that there was then a good flow of water, but it would soon be less. Plaintiff claims that in addition to this he further said that he intended to cultivate largely, and to take out a big ditch and control the creek, to which Whitmore replied that that was all right; and that thereupon the plaintiff asserted his right to use the water after the defendant's primary water right to the upper field, the land brought under irrigation from 1879 to 1881, but stated that if the defendants were going to increase their cultivation, he would not bother about such right. To this Whitmore replied, "Go ahead; we won't quarrel about it." This additional part of the conversation Whitmore, who is one of the defendants, denied.

The plaintiff claimed that, relying on this conversation, he commenced in the summer of 1885 a big ditch, but did not complete it that year. He also broke up some hundred acres and attempted to raise a crop without irrigation, but failed. It was his intention to construct a series of ditches, and cultivate as much as he could of the land under his control. Since such conversation he also made valuable improvements. It seems he commenced an additional ditch that year. In the winter of 1886 the plaintiff requested Whitmore to make a written agreement as to their water rights, but he declined to do so. During that year the defendants cultivated and irrigated their entire tract. The plaintiff completed his big ditch that year; but the dam went out in the spring and was not put back until August. In the fall or late summer water went through the ditch upon his premises, but no crop was secured. In 1887 the defendants again cultivated and irrigated all their cleared land until served with an injunction in September. The plaintiff irrigated his meadow through the big ditch, but got no water at all upon his farming land. That fall he plowed and sowed five hundred acres of farming land.

The stream in question is a very small one, except during high water in the spring and fall; and at times is insufficient to irrigate all of the defendants' land, or even to fill their ditch, which is about a foot and a half deep and from one and a half to two feet wide. There was a decree for the defendants, awarding to them the ownership by a prior appropriation of all the waters of the creek save in high water, and then to water sufficient to fill their ditch. The plaintiff appeals therefrom to this court.

Zane & Rogers and John M. Zane, for the appellants.

Brown & Henderson, for the respondents.

351 **ROLAPP, D. J.** The appellant in this case invokes the doctrine that this court "may go behind the findings of a trial court, and consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and make such findings and decree as should be made in the judgment of the appellate court": *Whittaker v. Ferguson*, 16 Utah, 241, 51 Pac. 980.

We reaffirm that doctrine, and assert that this court has full power to review all questions of law and fact in equity cases, and if in our opinion the judgment of the lower court in such

cases is not supported by the evidence, we may and will set such judgment aside. Still, that doctrine is governed by the further principle that "when such cases have been regularly tried before a court of chancery, and if it has found on all material issues, we will not disturb such findings unless they are so manifestly erroneous as to demonstrate oversight or mistake which materially affects the substantial rights of the appellant": *McKay v. Farr*, 15 Utah, 261, 49 Pac. 649. After a careful investigation of the record in the case before us, we have, however, absolutely failed to find any reason for setting aside the judgment of the lower court. In fact, it is difficult to see how that court, from the evidence adduced, could have reached a different conclusion. The testimony ³⁵² effectually shows a continuous user of the waters of the creek by the defendants through their ditch constructed in 1879, and enlarged to its present capacity in 1880. It is true that since such time the irrigated area of land has increased, and that they did not at first have their entire premises prepared for cultivation; but from the commencement they continued with unabated vigor to clear land and irrigate the same year after year, extending their cultivation without enlarging their ditch, and during the irrigation season using all of the waters of said creek upon such lands. Naturally, and from the testimony, we know that when irrigation is first introduced upon arid land it will moisten a much smaller area than it will after the soil has become saturated. Consequently, it is a matter of economy of time and increase of results to gradually extend the cultivated area below a stream, so far as the waters in such stream will permit, and continue to increase such cultivation as limited by the original intent of appropriation as evidenced by the size of the ditch and the conduct of the parties until the full capacity of the stream has been attained, or until some other person has completed an appropriation of the surplus waters of the stream. So far as plaintiff's efforts up to the commencement of this suit, in connection with the appropriation of the waters of this creek, are concerned, they consisted simply in the occupation, pasturing, clearing and plowing of lands near such creek, the user of certain springs upon a small part of the lands, the user of some of the water in 1881, after defendants' user, the user of the water once in 1882, some indefinite user in 1884 (at a time when the water was high), and the unsuccessful user of water in the fall of 1886. Even that little diversion of water from the creek was by the plaintiff applied

upon only eleven and a half acres of land, which also received irrigation from the so-called Big Springs. Under such circumstances we cannot say that the ³⁵³ plaintiff acquired any rights in the creek superior to the rights of the defendants. We see no reason why a settler in a new country may not appropriate the waters of an adjacent creek without having the lands he contemplates using the waters upon in a condition fit for irrigation at the time of his first diversion of such waters, at least until some other settler completes a successful, necessary and beneficial use of the then unappropriated waters of such creek. He is not confined to an appropriation simply for the amount of land irrigated during the first year of his diversion. The extent of an appropriation of water is determined by the reasonable necessity for the use of the water, by the intention of the appropriator, followed by a reasonable diligence in executing such intent, and by the beneficial purpose for which the appropriation is made: *Hagne v. Nephi Irr. Co.*, 16 Utah, 421, 52 Pac. 765.

Nor do we think that the evidence warrants the conclusion that defendants were estopped by their statements to plaintiff in May, 1885, from pursuing the full execution of their original intent of appropriation. At the time of making such statement, the entire lands of defendants were ready for cultivation and irrigation, and so far as the testimony relating to actual facts rather than the scientific guesses of an expert shows, the entire waters of the creek were necessary for the successful irrigation of such lands. Besides, the entire waters were then actually being used upon the defendants' lands, while at the same time plaintiff's small, indefinite and intermittent user of the waters was of such small moment that even plaintiff himself stated that he would not bother with even an assertion of his right if defendants would desist from further extending their cultivated area. The testimony shows that no further extension of cultivated ground was made by defendants, except as they rounded off the corners of one of the ³⁵⁴ fields. It is clear from the conversations themselves that at that time plaintiff had in view rather the imaginary possibilities of the waters of the creek than an interference with the then user of such waters by defendants. Even taking these conversations in the most favorable view for appellant, there was absolutely no statement upon the part of the defendants of an intended abandonment of an existing right. It was merely an acquiescence in the plaintiff's proposition that he

would thereafter use all the waters of the creek not then being used by defendants. It has frequently been held that an estoppel will not arise simply from a breach of promise as to future conduct, or from a mere disappointment of expectations. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right: *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544; *Allen v. Rundle*, 50 Conn. 9, 47 Am. Rep. 599.

The remainder of the errors assigned by appellant we do not feel called upon to decide, they not having been discussed by appellant in his brief.

We see no error in the record in this case, and the judgment of the lower court ought to be affirmed, and it is so ordered, and that the appellant pay the costs.

Baskin, J., concurs.

The Appropriation of Waters is considered at length in the note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 799-817. When water is appropriated the entire amount need not be at once utilized but the use may be made within a reasonable time. The prime requirement is that the appropriator must be reasonably diligent in making the application of the water to the purpose for which it is diverted: *Wimer v. Simmons*, 27 Or. 1, 50 Am. St. Rep. 685, 39 Pac. 6; *Moyer v. Preston*, 6 Wyo. 308, 71 Am. St. Rep. 914, 44 Pac. 845; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 60 Am. St. Rep. 777, 45 Pac. 472.

POSTAL TELEGRAPH CABLE COMPANY OF UTAH v. OREGON SHORT LINE RAILROAD COMPANY.

[23 Utah, 474, 65 Pac. 735.]

EMINENT DOMAIN.—Property Lying in Several Counties may be condemned for a telegraph line by one proceeding in one of the counties. (pp. 708, 709.)

EMINENT DOMAIN.—Description of Property.—A Complaint in an action by a telegraph company against a railroad company to condemn a right of way, alleging that the property is a railway running between certain termini within certain counties, and setting forth the amount of ground needed for each pole, and the distance of the poles from one another and the railway track, sufficiently describes the way desired. (pp. 709, 710.)

EMINENT DOMAIN.—The Fact that a Foreign Corporation is interested in a corporation organized under the laws of the state to construct a telegraph line does not affect the latter's right to condemn a right of way. (pp. 710, 711.)

CORPORATE EXISTENCE—Attacking in Eminent Domain.—The legal existence of a de facto telegraph corporation cannot be questioned when it is condemning property for a right of way. (pp. 711, 712.)

CORPORATE EXISTENCE—How May be Attacked.—The legal existence of a de facto corporation can be questioned only by the state in a direct proceeding for that purpose. (p. 712.)

EMINENT DOMAIN—Property Devoted to Public Use.—The right of way of a railroad, not essential to the employment of its franchises and property, may be appropriated for a telegraph line. (pp. 712, 713.)

EMINENT DOMAIN—Necessity of Taking.—When a railroad company refuses a bona fide offer to negotiate for the use of land in its right of way for a telegraph line, a necessity exists for the taking thereof, though there may be other land available. (p. 713.)

EMINENT DOMAIN.—A Corporation's Discretion in Selecting Land under the power of eminent domain will not be interfered with, unless it acts in bad faith or is guilty of oppression. (p. 713.)

EMINENT DOMAIN.—The Necessity or Expediency of appropriating any particular property, when the use is public, is not a subject of judicial cognizance. (p. 713.)

EMINENT DOMAIN—Property Devoted to Public Use.—A Telegraph company may construct its line on a railroad's right of way, in the absence of legislative authority, where the use of the land for railway purposes is not thereby materially interfered with. (pp. 713, 714.)

EMINENT DOMAIN—Evidence.—In an Action by a Telegraph company against a railroad company to condemn a right of way, the certificate of the postmaster general showing the acceptance of the act of Congress, whereby such companies are given the right to erect lines on post roads, is admissible in evidence. (p. 714.)

EMINENT DOMAIN—Compensation.—A Telegraph Company, condemning a railroad's right of way for its line, must make compensation therefor, to be ascertained under the state laws. (p. 714.)

EMINENT DOMAIN—Measure of Damages.—When a railroad's right of way is condemned for a telegraph line, the measure of damages is the decrease in the value of such way for railroad purposes. (p. 715.)

EMINENT DOMAIN—Elements of Damage.—When a railroad's right of way is condemned for a telegraph line, damages from the added expense of burning grass from the way by reason of the erection of the poles are too remote to be allowed. (p. 715.)

EMINENT DOMAIN—Nominal Damages.—The damages to be paid a railroad company, when its right of way is condemned for a telegraph line, are nominal. (p. 715.)

P. L. Williams, for the appellant.

Powers, Straup & Lippman, for the respondent.

476 HALL, J. In this case, it appears that on the fourteenth day of July, 1899, certain citizens of Utah, in connection with the assistant superintendent and the general counsel of the Postal Telegraph Cable Company, a corporation organized under the laws of New York, proceeded to organize under the

laws of Utah the respondent herein, the Postal Telegraph Cable Company of Utah. Ten per cent of the capital stock of the Utah corporation was paid in, the money being furnished by the New York corporation. All the requirements of the statutes of Utah relating to the organization of corporations were complied with. The articles of incorporation were duly filed with the county clerk of Salt Lake county, and a certified copy of the same was filed with the Secretary of State of Utah, who issued his certificate, as required by law, certifying that the respondent had complied with the provisions of the statutes and that it was duly incorporated. The directors of the respondent met and formally organized, directed that negotiations be had with appellant for a right of ⁴⁷⁷ way to construct a telegraph line along its railroad right of way from Salt Lake City north to the Idaho state line, and adopted a resolution selecting the right of way, and also proceeded to accept the provisions of an act of Congress, approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal and military and other purposes." Failing in its negotiations, respondent commenced this proceeding under the eminent domain act of Utah to condemn a right of way for the purpose of constructing, maintaining, and operating its telegraph line upon the right of way of the appellant longitudinally, from Salt Lake City north, through the counties of Salt Lake, Davis, Weber, Box Elder, and Cache, in this state, to the state line of Utah and Idaho—a total distance of about one hundred miles. In its complaint the respondent set forth the character of the construction of the telegraph line designed, the length of the poles, their size at the base, the depth that they would be planted in the ground, their distance from the railroad track, and the size of the cross-arms upon which wires are proposed to be strung. It was also alleged in the complaint that, when crossing the track of appellant, the wires would be strung high enough for safety, and that on reasonable notice from appellant, when it was necessary, the poles would be moved to such a point as the appellant might designate. The distance of the poles from each other and the amount of ground each would occupy was alleged; the general route and termini were described; the necessity for the taking, and the failure of the parties to come to terms were set forth; and the fact that the telegraph line would not interfere with the appellant's business was stated, as well as other allegations not necessary here to repeat. The defendant demurred

to the complaint upon two grounds: 1. That the court has no jurisdiction of the subject matter of the action, so far as the same is situated outside of Salt Lake ⁴⁷⁸ county and within the counties of Davis, Weber, Box Elder, and Cache, respectively; 2. That the complaint does not state facts sufficient to constitute a cause of action. After argument the demurrer was overruled by the lower court, and the appellant answered, denying the incorporation of respondent, and basing its defense principally upon an allegation that the respondent is the agent and under the control of the Postal Telegraph Cable Company of New York, a foreign corporation, which has not the power to exercise the right of eminent domain in this state, and which, through the organization of respondent, is seeking to do by indirection that which it cannot accomplish in its own name directly, and that in reality respondent has no separate existence from the Postal Telegraph Cable Company of New York. The case was tried in the district court without a jury, and the court found the issues for the respondent, assessing appellant's damages at one hundred dollars.

The contention of the appellant that the lower court had no jurisdiction of the subject matter of the action, so far as the same is included within the counties of Davis, Weber, Box Elder, and Cache, respectively, is not tenable. The thing which is sought by respondent by this proceeding is an entirety: Atchison etc. R. R. Co. v. Gough, 29 Kan. 94; Lower Kings River Water Ditch Co. v. Kings River etc. Canal Co., 60 Cal. 408; Lewis on Eminent Domain, sec. 475; St. Louis etc. Ry. Co. v. Postal Tel. Co., 173 Ill. 530, 51 N. E. 382. The damage which defendant is entitled to is for the whole property, and the cause of action arises in all five counties as a unit. The county lines crossing the right of way of appellant do not destroy the singleness of its use. Neither does it negative the fact that all the land constitutes but one right of way. As is said in Lewis on Eminent Domain, section 475, in defining what constitutes an entire tract: "In general, it is so much as belongs to the same proprietor as that taken, and is contiguous to it or used together for a common purpose." Our statute upon the subject ⁴⁷⁹ of eminent domain provides, among other things, as follows: "All proceedings under this chapter must be brought in the district court for the county in which the property or some part thereof is situated." This provision does not conflict with section 5, article 8 of our constitution, which provides that "all civil and criminal business arising in any county must be tried in such

county": *Deseret Irr. Co. v. McIntyre*, 16 Utah, 368, 52 Pac. 628. As said by this court in the case cited, the words of our constitution mean "that an action affecting realty shall be tried in the county where the business or the cause arises, or, if the cause of action arises in more counties than one, then in either of said counties." Part of the right of way sought being in Salt Lake county, and being an entirety extending through the other counties named, the respondent under our law clearly had the right to include the whole in one proceeding. By so doing it avoided bringing five different cases in five different courts in five different counties to condemn the identical right of way against the same defendant.

It is objected that the complaint does not so describe the lands or premises which respondent asks to have appropriated to its use that it can be definitely described in a judgment. The complaint asks for a right of way upon the railroad right of way between certain named termini within certain named counties in the state, and describes the amount of ground needed for each pole, the distance of the poles from each other, and their distance from the railroad track. When the object in the condemnation case is to secure a right of way through a farm or legal subdivision, it probably should be described by such subdivision; but this is for a right of way on an established railroad right of way, the locus of which is accurately fixed by survey, of which there are accessible records. It would seem that there can be no difficulty in so framing a judgment, with such description of the land taken, that parties ⁴⁸⁰ may know where it is. A railroad track is a fixed monument: *Lake Shore etc. Ry. Co. v. Pittsburg etc. Ry. Co.*, 71 Ill. 40. From this fixed monument other distances may be measured, and there does not appear to be any difficulty in locating exactly the line of construction to be followed by this telegraph company. The complaint describes the property upon which the respondent proposes to locate its telegraph line as the railway of appellant from Salt Lake City to Cannon Station, on the state line between Utah and Idaho. It alleges that the railroad bed is located near the center of its right of way, which is not less than one hundred feet in width; that the railroad track is four feet eight and one-half inches gauge, and upon the center of the railroad bed; that the telegraph line to be constructed will consist of poles thirty feet in length, planted firmly in the ground at a depth of not less than five feet, and thirty feet from the outer edge of the railroad track; that the poles will be erected at a distance of one

hundred and sixty-seven feet from each other on the right of way; that each pole will be one foot in diameter at the base, and will occupy only one square foot of ground; that no wires will be attached to appellant's fixtures, nor poles erected upon embankments, nor will the wires interfere with any other telegraph line; that the wires are to be attached to cross-arms high enough so that they will not interfere with appellant's property or business; and that the cross-arms will be eight feet in length. This description covers every reasonable intendment of the statute.

It is also insisted by appellant that the respondent is not a corporation either *de jure* or *de facto*. The respondent appears to have complied fully with the laws of Utah. Its incorporators entered into the required articles of agreement. They attached the statutory oath. Ten per cent of the capital stock was paid to its treasurer in cash. The articles were filed with the county clerk of the proper county. A certified copy of ⁴⁸¹ the articles was filed with the Secretary of State, and the Secretary of State issued his certificate of incorporation. It has performed corporate acts. It adopted a seal, and its officers have transacted corporate business. Clearly, it is a corporation, and, being such, it is a legal entity: *Exchange Bank v. Macon Const. Co.*, 97 Ga. 1, 25 S. E. 326; *Richmond etc. Const. Co. v. Richmond etc. Ry. Co.*, 15 C. C. A. 289, 68 Fed. 105. It is a citizen of Utah (*Wilson v. Triumph Con. Min. Co.*, 19 Utah, 66, 75 Am. St. Rep. 718, 56 Pac. 300), and by subdivision 8 of section 3588 of the Revised Statutes, it is granted the right to exercise the power of eminent domain. It may be true that the Postal Telegraph Cable Company of New York is interested in respondent; but that fact does not divest from respondent any of the corporate powers with which it is clothed. There is nothing in the letter, spirit or policy of the law which prohibits the same persons from forming and conducting two or more different corporations. This same question was before the United States circuit court for the district of Idaho (see *Postal Tel. Cable Co. v. Oregon etc. R. Co.*, 104 Fed. 623), in a case upon all fours with the one at bar, and the court said: "The objection is that plaintiff is not a corporation and is not organized in good faith. No one will doubt that the organization of plaintiff was for the purpose of co-operation with the Postal Telegraph Cable Company of New York. It may be said that it is subordinate to the latter, and is to assist it in carrying out its objects. It may be nothing more than an agent. This may be said of it more from general

circumstances than from the testimony in the case. This, however, is a common procedure with all large corporations. A recent instance is in mind. A railroad company, now operating in North Idaho, desiring to add a branch of about five miles, organized an independent company to build the same; and I think this defendant, in building the branch railroad ⁴⁸² from Nampa to Boise, did the same. It seems not an unusual matter for a large corporation to utilize small corporations for their purpose. If the plaintiff, however, is organized for a fraudulent purpose, the court will not lend its aid in the consummation of any fraud; but this I am unable to find against the plaintiff from the evidence. The facts are that it appears by the record to have organized according to the statutes. It has held corporate meetings and performed corporate acts. It has not built any telegraph line within the territory for which it was organized; but it is for the privilege of doing that in the place it deems most available and best for its use that it is now in this forum. Until it is clearly shown that this organization is based upon fraud, or that it is for some fraudulent purpose, the court must regard it as organized in good faith, and accede to it accordingly the statutory rights accorded it." These views are fully sustained by the following authorities: *Cunningham v. City of Cleveland*, 39 C. C. A. 211, 98 Fed. 657; *Lower v. Chicago etc. R. R. Co.*, 59 Iowa, 563, 13 N. W. 718; *Day v. Postal Tel. Co.*, 66 Md. 354, 7 Atl. 608; *In re New York etc. Ry. Co.*, 35 Hun, 220, 99 N. Y. 12, 1 N. E. 27; *Commonwealth v. New York etc. Ry. Co.*, 132 Pa. St. 591, 19 Atl. 291; *Frost v. Frostburg Coal Co.*, 24 How. 278.

However, the authority of respondent to exercise the power of eminent domain cannot be considered in this proceeding. While the burden of proving its corporate existence was by the denial in the answer placed upon respondent, it was only necessary that it prove that it was a corporation de facto: *Kilpatrick-Kock Drygoods Co. v. Box*, 13 Utah, 494, 45 Pac. 629. Having made such proof, its corporate existence cannot be inquired into collaterally: *Marsh v. Mathias*, 19 Utah, 350, 56 Pac. 1074. And this proceeding to condemn a right of way is a collateral proceeding so far as it concerns the question of the corporate existence of respondent: *Peoria etc. Ry. Co.* ⁴⁸³ *v. Peoria etc. Ry. Co.*, 105 Ill. 110; *Wellington etc. Ry. Co. v. Cashie etc. Lumber Co.*, 114 N. C. 690, 19 S. E. 646; *Portland etc. Turnpike Co. v. Bobb*, 88 Ky. 226, 10 S. W. 794; *Golden Gate Mill etc. Co. v. Joshua Hendy Mach. Works*, 82 Cal. 184, 23 Pac. 45.

And it may be stated as a general rule that the legal existence of a de facto corporation can only be questioned by the state in a direct proceeding instituted for that purpose: *Reisner v. Strong*, 24 Kan. 411; *Independent Order of Foresters v. United Order of Foresters*, 94 Wis. 234, 68 N. W. 1011; *Chicago etc. Ry. Co. v. Chicago etc. Ry. Co.*, 112 Ill. 601; *American Mortgage Co. v. Tennille*, 87 Ga. 28, 13 S. E. 158; *Stout v. Zulick*, 48 N. J. L. 599, 7 Atl. 362; *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113; *National Docks Ry. Co. v. Central Ry. Co.*, 32 N. J. Eq. 755, 760; *Rex v. Corporation of Carmarthen*, 2 Burr. 869. In the case of *Ward v. Minnesota etc. R. R. Co.*, 119 Ill. 287, 10 N. E. 365, the court says: "There is some proof that the petitioner is a corporation de facto, and that is all the law requires in this class of cases. There is evidence, although it may be slight, of corporate acts done by petitioner. It appears that an engineer has been appointed, the line of the proposed road has been located, and other steps taken toward the building of the road. . . . These are corporate acts, and tend to show that petitioner is a corporation de facto": See, also, *Colorado etc. Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 297; *Smith v. Sheely*, 12 Wall. 358.

That the telegraph is a public use, and the business of telegraphy is obviously a public business, is well established. It is a quasi public employment—one not merely exercised for the purpose of private gain, but for the general benefit and welfare of the community. A telegraph company is a public servant, which must serve all alike who make demands upon it, and its right to exercise the power of eminent domain is ⁴⁸⁴ recognized by our statutes and by numerous decisions of the courts: *Rev. Stats.*, sec. 3588, subsec. 8; *Joyce on Electric Law*, sec. 274; *Lewis on Eminent Domain*, sec. 172. The use, then, to which respondent seeks to apply the land to be condemned is a public use, recognized by law. It is, however, contended that the land sought is already devoted to a public use, and that the condemnation for telegraph purposes will not be devoting it to a more necessary public use. The land which respondent seeks to condemn is not now used for any purpose. Practically it is now idle property, and the new use promises to be one of public utility. The appropriation of the right of way of a railroad not essential to the enjoyment of its franchises and property, for the construction of a telegraph line, is to and for a more necessary public use: *Southern Pac. Ry. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 231, 43 Pac. 602.

It is also argued that no necessity has been shown to exist for the taking of the right of way. But it is shown that the respondent made a bona fide effort to agree with the appellant upon terms for the taking of the land sought, and that the latter refused to consider respondent's proposition or to negotiate with it at all. The necessity, therefore, exists for the taking. It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work. The necessity is shown to exist when it appears that it is necessary to take the land by condemnation proceedings in order to effectuate the purposes of the corporation: *New York etc. R. R. Co. v. Kip*, 46 N. Y. 553, 7 Am. Rep. 385; *Buffalo etc. R. R. Co. v. Brainard*, 9 N. Y. 110. The respondent has the right to determine when and where its telegraph line shall be built. It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with: *Railway Co. v. Petty*, 57 Ark. 359, 21 S. W. 485 884; *Englewood Connecting Ry. Co. v. Chicago etc. Ry. Co.*, 117 Ill. 611, 6 N. E. 684; *O'Hare v. Railroad Co.*, 139 Ill. 151, 28 N. E. 923; *Stark v. Railroad Co.*, 43 Iowa, 501; *Peavey v. Railroad Co.*, 30 Me. 498; *Fall River Iron Works Co. v. Oil Colony etc. R. R. Co.*, 5 Allen, 221; *Railroad Co. v. Stoddard*, 6 Minn. 150 (Gil. 92); *Dietrichs v. Railroad Co.*, 13 Neb. 361, 13 N. W. 624; *Railroad Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Colorado etc. Ry. Co. v. Union Pac. Ry. Co.*, 41 Fed. 293; *New York Cent. etc. R. R. Co. v. Metropolitan Gaslight Co.*, 5 Hun, 201. With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do: *Tracy v. Railroad Co.*, 80 Ky. 259; *In re New York Cent. etc. R. R. Co.*, 77 N. Y. 248; *Railroad Co. v. Hooper*, 76 Cal. 404, 18 Pac. 599. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance: *Boom Co. v. Patterson*, 98 U. S. 403, 406; *St. Louis etc. Ry. Co. v. Hannibal Union Depot Co.*, 125 Mo. 82, 28 S. W. 483.

It is contended by appellant that the respondent had no power to locate its telegraph line longitudinally upon appellant's right of way, because, when the lands had been once taken, by virtue of the power of eminent domain or otherwise, and appropriated to a public use, as is the right of way in controversy, such land cannot again be subjected to another public use, un-

less such secondary appropriation be authorized by the legislature. The authorities, however, affirm that this rule only applies when the second public use, by reason of its nature or character necessarily supersedes or destroys the former use. Where, as in this case, the construction of the telegraph line will not materially interfere with the use of appellant's land for railroad purposes, it is clear that the rule does not apply: *Baltimore etc. Ry. Co. v. Board of Commrs.*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; *Gold v. Pittsburgh etc. Ry. Co.*, 153 ⁴⁸⁶ Ind. 232, 53 N. E. 285; *Steele v. Empsom*, 142 Ind. 397, 41 N. E. 822; *Southern Pac. R. R. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602; *Southwestern Tel. etc. Co. v. Gulf etc. Ry. Co.* (Tex. Civ. App.), 52 S. W. 106; *St. Louis etc. Ry. Co. v. Postal Tel. Co.*, 173 Ill. 521, 51 N. E. 382. Mr. Lewis, in his work on Eminent Domain, section 269, says: "A telegraph line may be established along a railroad right of way, it being no material interference with the use thereof for railroad purposes." And this is undoubtedly the law. A telegraph line, constructed as proposed, will not, in the nature of things, interfere with the operation of appellant's railroad.

The certificate of the postmaster general of the United States, showing the acceptance by respondent of the provisions of the act of Congress of July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," was properly admitted in evidence. By accepting the provisions of this act, respondent is given the right to erect its telegraph lines upon all post roads; and by section 3964 of the Revised Statutes of the United States all railroads are made post roads. But before respondent can exercise the right thus granted by Congress, it must have fixed and paid to the appellant just compensation for the easement. This is ascertained by resorting to the state law relative to eminent domain. The state law becomes auxiliary to the act of Congress, and provides the method of condemnation and compensation. In other words, a right is given by this act of Congress, and the remedy is furnished by the laws of the state: *Postal Tel. Cable Co. v. Southern Pac. R. R. Co.*, 89 Fed. 190; *Gilmer v. Lime Point*, 18 Cal. 229; *Postal Tel. Cable Co. v. Morgan's Louisiana etc. S. S. Co.*, 49 La. Ann. 58, 21 South. 183; *Smith v. Drew*, 5 Mass. 513; *Rogers v.* ⁴⁸⁷ *Bradshaw*, 20 Johns. 735-744; *Kohl v. United States*, 91 U. S. 373; *Sutherland on Statutory Construction*, sec. 399.

It is also claimed that the lower court erred in the rule as to the measure of damages which it adopted. It is insisted that

the value of the property taken should be measured by the most advantageous use to which it could be put. That rule is undoubtedly correct where one owns property in fee and may put it to any use which he chooses; but it is not the rule, as in this case, where the railroad right of way can only be devoted to railroad uses. Even though the award be nominal, if the sum awarded is a full and fair equivalent for the thing taken, it is just compensation. In the case of a railroad company whose right of way is held for railroad purposes, it is not a question as to what the property would be worth to the most advantageous use to which it could be put; but the question is, How much will the land be damaged for railroad purposes by the erection of the telegraph line? *St. Louis etc. Ry. Co. v. Postal Tel. Co.*, 173 Ill. 508, 51 N. E. 382; *Chicago etc. Ry. Co. v. City of Chicago*, 149 Ill. 457, 37 N. E. 78, 166 U. S. 226, 17 Sup. Ct. Rep. 581. The railroad company holds its right of way strictly for railroad purposes, and is restricted in its use of the same for such purposes. Under this view of the estate which the railroad company has in its right of way, it is difficult to see how the damage from the erection of a telegraph line can be more than nominal. Evidence was introduced by appellant to show damages from the added expense of burning grass from the right of way by reason of the erection of telegraph poles; but such damages are too remote: *Southwestern Tel. etc. Co. v. Gulf etc. Ry. Co.* (Tex. Civ. App.), 52 S. W. 107. Neither can damages be allowed for imaginary dangers: *Jones v. Chicago etc. R. R. Co.*, 68 Ill. 380; *Fremont etc. R. R. Co. v. Lamb*, 11 Neb. 592, 10 N. W. 493; *Chicago etc. Ry. Co. v. Town of Cicero*, 157 Ill. 48, 41 N. E. 640; *Lockie* ⁴⁸⁸ *v. Mutual Union Tel. Co.*, 103 Ill. 401. Where, as in this case, a telegraph company has a right under the statutes to condemn a right of way on the right of way of a railroad, the damages to be paid to the railroad company are nominal, inasmuch as the railroad company only owns a right of way, and such a right of way is not interfered with by the telegraph company: *Chicago etc. R. R. Co. v. Catholic Bishop*, 119 Ill. 529, 10 N. E. 372; *Hilcoat v. Bird*, 10 Com. B. 327; *Allen v. City of Boston*, 137 Mass. 319; *In re Albany St.*, 11 Wend. 149, 25 Am. Dec. 618; *Chicago etc. Ry. Co. v. City of Chicago*, 166 U. S. 258, 17 Sup. Ct. Rep. 992.

We find no error in the record, and the judgment of the lower court must be affirmed, with costs.

Bartch and Baskin, JJ., concur.

Eminent Domain.—When the question of the existence of a public use may be considered by the courts is discussed in the monographic note to *Chicago etc. Ry. Co. v. Morehouse*, 88 Am. St. Rep. 926-946. And the necessity of the taking is discussed in the note to *Lynch v. Forbes*, 42 Am. St. Rep. 406-408. The selection of the land to be condemned is ordinarily within the discretion of the corporation exercising the right of eminent domain: In the *Matter of New York R. R. Co.*, 46 N. Y. 346, 7 Am. Rep. 385; *Kansas etc. Ry. Co. v. Northwestern etc. Co.*, 161 Mo. 288, 84 Am. St. Rep. 719, 61 S. W. 684. Property already devoted to a public use may be acquired under the power of eminent domain: *Kansas etc. Ry. Co. v. Northwestern etc. Co.* 161 Mo. 288, 84 Am. St. Rep. 717, 61 S. W. 684; *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Chicago etc. Ry. Co. v. Starkweather*, 97 Iowa, 159, 59 Am. St. Rep. 404, 66 N. W. 87; *Little Nestucca Road Co. v. Tillamook Co.*, 31 Or. 1, 65 Am. St. Rep. 802, 48 Pac. 465. And in an assessment of damages for the taking of property of one railroad for another, the amount of damages must at least be approximately shown, and if they are not no more than nominal damages can be allowed. Direct and immediate damages only are recoverable: See the monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 145.

CLARK v. CAMPBELL.

[23 Utah, 569, 65 Pac. 496.]

ESCROW—Necessity of Contract.—The deposit of mining stock, with a writing authorizing its purchase by a certain person for a stated price within a stated time, is not binding as an escrow, though so styled, if there is no binding contract therefor between the parties. (p. 717.)

CORPORATE STOCK.—Dividends on corporate stock belong to the person holding it at the time they are declared. (pp. 717, 718.)

CORPORATE STOCK in Escrow—Dividends.—If mining stock is deposited under an escrow agreement that it shall pass to a certain person on the payment of a stated price within a stated time, dividends declared before the price is paid do not belong to the purchaser. (pp. 718, 721.)

Action to recover nineteen thousand dollars, the amount of a dividend on certain stock. It appears that on October 29, 1898, in pursuance of negotiations between defendant Campbell and L. C. Trent, agent of the plaintiff, the defendant deposited mining stock with Wells, Fargo & Company; and he also signed and deposited with the stock an instrument styled "Escrow. To Wells, Fargo & Co., Bankers, Salt Lake City." This instrument, after describing the stock deposited, provided as follows: "If L. C. Trent, or his agent, shall pay to my credit at your bank the sum of seventy-five thousand dollars on or before November 24, 1893, then and thereupon you shall de-

liver to him all the inclosed certificates of stock. If, however, said Trent, or his agent, shall fail to pay to my credit at your bank said sum of seventy-five thousand dollars on or before November 24, 1898, then, and upon such failure, you shall return to me all the inclosed shares and certificates. The time limited for the payment of said seventy-five thousand dollars, as aforesaid, is expressly made material to, and of the essence of, the option given by me to said Trent to purchase said shares for said sum, and his option terminates and ceases absolutely at the end of the time limited above for the payment of said seventy-five thousand dollars."

The writing and the stock remained as deposited until November 24, 1898, when the plaintiff paid to Wells, Fargo & Company, the sum of seventy-five thousand dollars. But on November 22d, a dividend of nineteen thousand dollars had been declared on the stock and paid to the defendant. The plaintiff did not know on November 24th that this dividend had been declared. The jury, under the court's direction, returned a verdict for the defendant. The plaintiff appeals.

R. B. Shepard, Allen T. Sanford, Harrison O. Shepard, and Roote & Clark, for the appellant.

Bennett, Harkness, Howat, Sutherland & Van Cott, for the respondent.

571 HART, D. J. The main question is, Who is entitled to the dividends declared and paid, in view of the facts of this case? It is insisted on behalf of plaintiff Clark that the so-called "escrow" was a binding agreement upon the defendant Campbell, before the acceptance of the same by Clark; and that, when the latter did accept the terms of the offer, and made payment on November 24th, and the stock was delivered to him, the transaction related back to the delivery of the so-called "escrow" to the **572** depositary on October 29th, and the title should be held to pass as of that date, and thus entitle Clark to the dividends declared subsequently to that date. As there was no withdrawal, or attempted withdrawal, by Campbell of the offer made in the so-called "escrow" before the same was accepted by Clark, it is not very material to inquire how far the "escrow" was binding upon Campbell prior to the acceptance of the terms by Clark and the payment of the amount required. It may be noted, however, for whatever bearing the same may have in view of subsequent developments, that the instrument deposited was

not signed by, nor on behalf of, Clark; and he was not bound to do anything. No money consideration appears to have been given for the writing, nor does there appear to have been any independent contract between the parties as to said "escrow" either binding Campbell to keep the offer to sell open for the time named, or binding Clark to buy the said stock at any time, or at all. Doubtless, bills or notes or stocks, as well as real estate, may be the subject of an escrow agreement. As to the necessity for an actual contract, 1 Devlin on Deeds, section 313, says: "Not only are sufficient parties, a proper subject matter, and a consideration required, but also an actual contract by the parties. In other words, the grantor must have sold and the grantee must have purchased the land; for a proposal to sell or a proposal to buy, although it may be stated in writing, is not sufficient. An actual contract of sale on one side and purchase on the other is just as requisite as the execution of the instrument by the grantor to make it an escrow": *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Fitch v. Bunch*, 30 Cal. 208; *Hoig v. Adrian College*, 83 Ill. 267; *Stanton v. Miller*, 58 N. Y. 197. In the Wisconsin case above cited the court say: "But we have not discovered a single case in which it has been held that one who has deposited a deed of land with a third person with directions to deliver it to the grantee on the happening of a given event, but who has ⁵⁷³ made no valid executory contract to convey the land, may not revoke the directions to the depository and recall the deed at any time before the conditions of the deposit have been complied with, provided these conditions are such that the title does not pass at once to the grantee upon delivery of the deed to the depository." If title to the mining stock did not pass to Clark until November 24, 1898, then, according to the well-established rule, Campbell is entitled to the dividend, as being the owner of the stock on the day the dividend was declared. The doctrine is quite fully stated in the case of *Wheeler v. Northwestern Sleigh Co.*, 39 Fed. 347, as follows: "Stockholders are, as to the property of the corporation, quasi partners, holding per my et per tout. The earnings of the corporation are part of the corporate property, held by the same tenure; and until separated from the general mass, the interest of the stockholders therein passes with the transfer of the stock; and this irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass of property, and appropriated to the then stockholders, who become creditors of the corporation, for the amount of the

dividend. The relationship of the stockholder to the corporation, as to the amount of the dividend, is thus changed from one of partnership ownership to that of creditor. He therefore stands to the corporation in a dual relation—with respect to his stock, as partner and part owner of the corporate property; with respect to the dividend, as creditor upon a par with other creditors of the corporation. The severance of the earnings from the general mass of corporate property, and the promise to pay, arising from the declaration of the dividend, works this change. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual ⁵⁷⁴ who, at the time of the declaration of the dividend, was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of the dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be transferred with the stock by special agreement, but not otherwise. The dividend would not pass as an incident of the stock.” Among other authorities sustaining the general rule that dividends belong to the owner of the stock at the time the same are declared, are the following: 2 Thompson on Corporations, secs. 2172-2176; Dow v. Gould etc. Min. Co., 31 Cal. 630, 648; Jones v. Terre Haute R. R. Co., 57 N. Y. 196; Boardman v. Lake Shore etc. Ry. Co., 84 N. Y. 157; Cook on Stock and Stockholders, sec. 541; Jermain v. Lake Shore etc. Ry. Co., 91 N. Y. 483; In re Kernochan, 104 N. Y. 618, 11 N. E. 149; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; Hopper v. Sage, 112 N. Y. 532, 8 Am. St. Rep. 771, 20 N. E. 350.

The essential inquiry is, When did the title to the stock pass to Clark? Was it on October 29th, when the option and stock were deposited, or was it on November 24th, the date of the acceptance, payment and delivery? Conceding, for the purposes of this case, that the writing deposited was an escrow agreement, binding upon Campbell before acceptance by Clark, still it by no means follows that upon delivery to Clark of the stock on November 24th, the sale related back and took effect as of August 29th. We are aware of the rule, in certain cases of escrow contracts, to permit the deed to take effect by relation as of the time of the first delivery. The rule is thus stated in Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427: “By all of the authorities, a deed so deposited with a

third person to be delivered to the grantee on the happening of some event in the future, which may or may not happen, does not pass title to the land described in it to the grantee until such ⁵⁷⁵ event occurs, and then only from that time, or perhaps from the actual delivery of the deed to the grantee after the event has occurred. There may be exceptional cases—as where a man delivers his deed in escrow, and dies before the conditions of the deposit are fulfilled. In such cases it has been said that from necessity, after the conditions are fulfilled, the deed must take effect by relation as of the time of the first delivery”: *Prutsman v. Baker*, 30 Wis. 640, 11 Am. Rep. 592; *Taft v. Taft*, 59 Mich. 185, 26 N. W. 426, 60 Am. Rep. 291. But the facts of the case at bar do not bring it within any of the exceptional cases permitting title to pass as of the first delivery. This case is also distinguishable from cases where there was an absolute agreement of sale and purchase, so as to be a sale in praesenti. The cases of *Currie v. White*, 45 N. Y. 822, *Johnson v. Underhill*, 52 N. Y. 203, and *Phinizy v. Murray*, 83 Ga. 747, 20 Am. St. Rep. 342, 10 S. E. 358, are all clearly distinguishable from the case at bar. In so far as the case of *Harris v. Stevens*, 7 N. H. 454, supports plaintiff's claim to the dividends in question, the same is against the great weight of authority. Under the undisputed evidence in this case, Campbell is entitled to the dividends as a matter of law, and the trial court did not err in so instructing the jury. There was no agreement between the parties as to who should have any dividend declared before the acceptance of the offer to sell, and therefore there was nothing in this connection that should have been submitted to the jury. It was not the case of an attempted, imperfect, or ambiguous agreement as to the right to dividends on the stock sold, and there was nothing to submit to the jury in that connection. It was purely a question of law to award the funds sued for under the undisputed evidence. While there is some complaint that plaintiff was misled, in that he believed that he was buying the bank funds represented by the dividends declared and paid, it must be noted that this is not an action to rescind the contract on the ⁵⁷⁶ ground of mistake or fraud. This disposes of many of the errors assigned, and not particularly mentioned above. There being no reversible error in the trial of the case, it is ordered that the judgment be affirmed, at appellant's cost.

Baskin and Bartch, JJ., concur.

Escrow.—There can be no escrow until there is an actual contract of sale on the one side and of purchase on the other. Unless both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow: *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176, 27 Pac. 589. A deed delivered in escrow becomes operative only from the performance of the condition and the actual delivery: *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37, 14 South. 663.

Dividends on Corporate Stock belong to the owner of the stock at the time they are declared: *Hopper v. State*, 112 N. Y. 530, 8 Am. St. Rep. 771, 20 N. E. 350; *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 25 Atl. 1032. L. contracted previous to July 3d to sell stock to B. at the latter's option, to be accepted by July 16th. On the last-named day the shares were transferred to B., but on July 3d a dividend was declared payable August 1st. The dividend was held to belong to L.: *Bright v. Lord*, 51 Ind. 272, 19 Am. Rep. 732.

CONANT v. DEEP CREEK AND CURLEW VALLEY IRRIGATION COMPANY.

[23 Utah, 627, 66 Pac. 188.]

WATER RIGHTS—*Nature of Action to Determine.*—An action to quiet the title and establish the right to water for irrigation is in the nature of an action to quiet title to real estate. (pp. 722, 723.)

REAL ACTION.—The Courts of One State are without jurisdiction to determine suits affecting the title to lands in another state. (pp. 723, 724.)

WATER RIGHTS—*Jurisdiction when Stream in Two States.*—Where a stream rises in Idaho and flows into Utah, an Idaho court has no jurisdiction to determine the title and right to the water flowing in Utah and there diverted and used for irrigation. (pp. 722, 725.)

JURISDICTION—*Consent to, and Waiver of.*—Jurisdiction of the subject matter of a suit cannot be conferred by consent, neither can the want thereof be waived. (p. 725.)

Richards & Allison, for the appellants.

A. R. Heywood, for the respondents.

628 MORSE. D. J. It appears from the record in this case that in April, 1896, the respondent, Henry Conant, and one Edward Conant commenced an action in the district court of Oneida county, in the state of Idaho, to quiet their title to certain waters flowing through the channel of a stream or creek commonly called "Deep creek" or "Curlew creek," which rises in Oneida county, Idaho, and flows through a portion of that county into Box Elder county, Utah, in which action all

the appellants appeared, either as defendants or as complainants in intervention, and each claimed to be the owner and entitled to the possession and use of certain portions of the waters of said stream, and all participated in the trial of said cause. A number of persons, residents of the state of Idaho, who claimed and diverted water from said stream in said state, were also made parties defendant in said action. The water claimed by the appellants, Deep Creek and Curlew Irrigation Company and Curlew Irrigation and Manufacturing Company, was diverted from said stream at points in Oneida county, Idaho, and was used by them for irrigation purposes in ⁶²⁹ Oneida county, Idaho, and in Box Elder county, Utah, and the waters claimed by the respondents Henry Conant and said Edward Conant, as well as the waters claimed by all the other appellants, were diverted from said stream at points in Box Elder county, Utah. On August 6, 1896, a decree was rendered and entered in said action awarding to the plaintiffs and to each of the defendants and interveners therein specific quantities of the waters of the flow of said stream, and quieting their titles thereto, and directing the method of measuring and diverting the same, from which decree no appeal was taken, and the same became final in the Idaho court. On the 15th of August, 1899, the respondents commenced this action in the district court of Box Elder county, basing their complaint upon the decree entered in the Idaho court, and praying for a decree in accordance therewith; and from such a decree entered by said district court this appeal is taken.

The principal question presented by this appeal is, Did the Idaho court have jurisdiction to try and determine the title and right to the use of the water flowing in that portion of Curlew creek situated within Box Elder county, Utah, and diverted therefrom in said county, and used for irrigation upon land located therein, and to quiet the title thereto? A right to divert and use the waters of a stream, acquired by appropriation, is a hereditament appurtenant to the land for the benefit of which the appropriation is made: *Bear Lake & River Waterworks etc. Co. v. Ogden City*, 8 Utah, 494, 33 Pac. 135; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland v. Olsen*, 11 Mont. 27, 27 Pac. 339; *Cave v. Crafts*, 53 Cal. 135; *Simmons v. Winters*, 21 Or. 35, 28 Am. St. Rep. 727, 27 Pac. 7. "The terms 'land,' 'real estate,' and 'real property,' include land, tenements, hereditaments, water rights, possessory rights and claims": *Rev. Stats.*, subd. 10, sec. 2498. An action, there-

fore, to quiet title and determine and to establish the right to divert and use water for such purposes is in the nature ⁶³⁰ of an action to quiet the title to real estate, and must be commenced and prosecuted in the courts of the state in which the same is situated. The courts of one state are without jurisdiction to hear and determine suits affecting the title to lands in another state: *Nelson v. Potter*, 50 N. J. L. 324, 15 Atl. 375. In the case of *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379, it is said: "The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment, or like process against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title." In *Davis v. Headley*, 22 N. J. Eq. 115, the complainant obtained a decree in the circuit court of Kentucky against Headley that a conveyance of lands in New Jersey, made by the complainant, should be rescinded and set aside, the possession restored, and the defendant enjoined from setting up the conveyance. He then filed a bill in the court of chancery in New Jersey to enforce the decree. The jurisdiction of the parties by the Kentucky court was undisputed. The bill to enforce the decree was nevertheless dismissed. Chancellor Zabriskie, in dismissing the bill, declared that: "It is a well-settled principle of law in the decisions in England and this country, and acquiesced in by the jurists of all civilized nations (and thus part of the *jus gentium*), that immovable property known to the common law as 'real estate' is exclusively subject to the laws and jurisdictions of the courts of the nation or state in which it is located. No other laws or courts can affect it. I find no case in which a statute, judgment or proceeding in one country has been held to affect such property when situate in another country, or beyond the jurisdiction of the sovereign or court making the statute or decree." In *Carpenter v. Strange*, 141 U. S. 105, 11 Sup. Ct. Rep. 966, Chief Justice Fuller, delivering the opinion of the court says: "The real estate was situate in Tennessee, ⁶³¹ and governed by the laws of its situs; and while, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within his jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant; as, for instance, by directing a deed to be executed or canceled by or on behalf of the party. The court has no inherent power by the mere force of its decree to

annul a deed or to establish a title. Hence, although, in cases of trusts, of contract, and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated. . . . The courts of Tennessee were not obliged to surrender jurisdiction to the courts of New York over real estate in Tennessee exclusively subject to its laws and the jurisdiction of its courts." It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we cannot agree. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another state, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights; *Howell v. Johnson*, 89 Fed. 556. The Idaho courts, therefore, have ample ⁶³² and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto; and by the decree entered in the suit in the district court of Oneida county, Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law cannot be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this state, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this state, and in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit.

The respondents contend that the appellants, by having interpleaded in the Idaho case, and participated in the trial thereof, are estopped by the force of that adjudication from questioning it. Jurisdiction of the subject matter of a suit cannot be conferred by consent; neither can the want of such jurisdiction be waived: *White v. Seely*, 1 Utah, 191; *Konold v. Rio Grande etc. Ry. Co.*, 16 Utah, 151, 51 Pac. 256; *Hawes on Jurisdiction*, secs. 9, 10, 12, 239; 1 *Freeman on Judgments*, sec. 120; 1 *Black on Judgments*, secs. 217, 218; 12 *Ency. of Pl. & Pr.* 127. It is ordered that the decree of the district court be set aside, and the case remanded, with directions to dismiss the suit, and that respondents pay costs.

Baskin and Bartch, JJ., concur.

The Courts of Each State have exclusive jurisdiction over questions relating to the rights, titles and interests in land within its jurisdiction: Richardson v. De Giverville, 107 Mo. 422, 28 Am. St. Rep. 426, 17 S. W. 974; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802, 15 Atl. 379; *La Selle v. Woolery*, 14 Wash. 70, 53 Am. St. Rep. 355, 44 Pac. 115; monographic note to *Alley v. Caspari*, 6 Am. St. Rep. 182.

The Want of Jurisdiction of the subject matter of a suit cannot be waived by consent: Town of Wayne v. Caldwell, 1 S. Dak. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Block v. Henderson*, 82 Ga. 23, 14 Am. St. Rep. 138, 8 S. E. 877. Compare *Sentenis v. Ladew*, 140 N. Y. 463, 37 Am. St. Rep. 569, 35 N. E. 650.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

WEBER v. LAIDLER.
[26 Wash. 144, 66 Pac. 400.]

LANDS Entered Under the United States Homestead Act cannot be made liable for a debt contracted before the issuance of a patent therefor, by any unwilling or involuntary appropriation thereof, as by execution or attachment. (p. 728.)

FEDERAL HOMESTEAD.—A Valid and Enforceable Mortgage may be made upon government land, entered under the United States homestead act, prior to the issuance of a patent therefor, if title is subsequently acquired. (p. 728.)

IF ONE CONVEYS OR MORTGAGES LAND to Which He has then no Title, his after-acquired title will inure to the benefit of his grantee or mortgagee. (p. 728.)

A MORTGAGE is not an Alienation within the meaning of a statute prohibiting the alienation of land, since its purpose is not to pass absolute title. (p. 729.)

FEDERAL HOMESTEAD.—A Mortgage upon Government Land Prior to Entry thereon under the United States homestead law is valid and enforceable on the ground of estoppel. (p. 732.)

Winthrop B. Presby, for the appellants.

Dufur & Menefee and N. B. Brooks, for the respondent.

144 HADLEY, J. On the sixteenth day of February, 1892, Walter R. Laidler and wife executed and delivered to the Lombard Investment Company their mortgage upon certain real estate situated in Klickitat county. The mortgage was given to secure a loan of three hundred dollars and interest. At the same time another mortgage was given to secure the additional sum of sixty dollars and interest, the latter being, by its terms, made junior to the former. Thereafter the said

¹⁴⁵ mortgages and the notes secured thereby were duly assigned to the respondent herein. Default having been made in payment of the loans secured as aforesaid, the respondent instituted this action to foreclose said mortgages. The appellants were made parties defendant in the action, together with the makers of the notes and mortgages. The complaint alleges that the appellants claimed an interest in said real estate by reason of a certain deed made by said mortgagors to them, but that any rights appellants may have in the premises are subject to the lien of said mortgages. The appellants answered the complaint, and admitted the execution and delivery of the mortgages, but deny that said instruments ever constituted valid liens upon the land; and they allege affirmatively that at the time of making said instruments in the form of mortgages neither of said mortgagors had any title to said land, but that the entire title thereto, both legal and equitable, was then in the United States; that subsequently the mortgagor Walter R. Laidler entered said lands as a homestead under the laws of the United States, and thereafter a patent therefor was issued to said Walter R. Laidler under said homestead laws; that subsequent to the making of final proof for said lands the said Walter R. Laidler, together with his wife, conveyed the same to appellants. The answer concludes with the demand that the court shall decree that said instruments in the form of mortgages do not constitute liens upon said lands. To the new matter alleged in said answer respondent demurred, and the demurrer was by the court sustained. Appellants elected to stand upon their answer, and declined to plead further, and thereupon a decree was entered foreclosing the mortgages, and declaring them to be liens upon the lands, in accordance with the ¹⁴⁶ complaint. The case is now before this court on appeal from said decree.

The only question presented by the record is, Did the court err in sustaining the demurrer to the answer? The principle involved is, Can one, before entering public lands, or before the patent issues therefor, execute a mortgage which becomes a valid lien thereon, if he subsequently acquires the title thereto? Appellants contend that such mortgages cannot be valid liens, by reason of the provision of section 2296 of the Revised Statutes of the United States. That section is as follows: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The decisions are not uniform in their interpretation of the full meaning of the above statute. They invariably agree that lands cannot be made liable for a debt contracted before the issuance of a patent therefor when it is sought to subject the land to the payment of such debt by any unwilling or involuntary appropriation thereof—as by way of execution or attachment; but we believe the decided weight of authority in those states where the public domain has been subject to disposal since the passage of the above statute is in favor of sustaining a mortgage upon such lands upon the principle that the act of the mortgagor is voluntary, and he is estopped to deny its validity. The principle is too well established to call for discussion that, ordinarily, if one conveys or mortgages lands to which he has then no title, his after-acquired title will inure to the benefit of his grantee or mortgagee. The same rule must apply here, unless prevented by the statute mentioned, and also by the further provision in the statutes of the United States which prohibits alienation ¹⁴⁷ of the land pending the period preceding final proof. As far as we are advised, this precise question has not hitherto been before this court. Appellants refer us to *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460, as being decisive of the point. But that case appears to have involved a proceeding in attachment, and a levy and sale under execution. The validity of a mortgage upon such lands is not there discussed. We have been referred to a few decisions which hold that such a mortgage cannot be sustained by reason of the federal statute. Notably among these is the decision of the supreme court of Kansas in *Brewster v. Madden*, 15 Kan. 249. In the case of *Biddle v. Adams*, 5 Kan. App. 734, 46 Pac. 986, the court says: "The only question which remains in this case is whether the law applied by the district court was correct. If the question were a new one we should be strongly inclined, in a case of this kind, to hold in favor of the plaintiff in error, but the supreme court of this state has settled the law fully in the case of *Brewster v. Madden*, 15 Kan. 249. In that case the facts were very similar to those in the one under discussion, but it was there held that a mortgage given while title to the land was still in the United States was void. It is urged by counsel for plaintiff in error that that case ought not to be followed, for the reason that since its decision a more equitable doctrine has been laid down by the Secretary of the Interior of the United States, but our supreme court has followed the case of *Brew-*

ster v. Madden, 15 Kan. 249, in Mellison v. Allen, 30 Kan. 382, 2 Pac. 97, and until a contrary doctrine is announced we feel bound by the decisions of that court."

It thus appears that the appellate courts of Kansas are not harmonious in their views upon this subject, and, if it were an original question in that state, a different rule might be adopted. The California supreme court has repeatedly held directly opposite to the doctrine of the Kansas court: *Kirkaldie v. Larrabee*, 31 Cal. 456, 89 Am. Dec. 205; *Christy v. Dana*, 34 Cal. 548; *Christy v. Dana*, 42 Cal. 174; *Camp v. Grider*, 62 Cal. 20; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693.

The doctrine of the California court has also been adopted in the following cases: *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 825; *Wilcox v. John*, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880; *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453; *Norris v. Heald*, 12 Mont. 282, 33 Am. St. Rep. 604, 29 Pac. 1121; *Fuller v. Hunt*, 48 Iowa, 163; *Spiess v. Neuberger*, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Jones v. Yoakam*, 5 Neb. 265; *Lang v. Morey*, 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88.

The above cases proceed upon the theory that the exemption provided by the statute is meant to be a protection to the settler against a sale of the land involuntarily under execution, but that it does not prevent him from borrowing money, and voluntarily creating a lien by way of mortgage to secure the same. They also hold that a mortgage is not an alienation within the meaning of the statute, for the reason that it is not the purpose of a mortgage to pass absolute title. It is to be presumed that it is always the purpose of the mortgagor to pay the debt secured by his mortgage, and thus prevent an absolute title from accruing to the mortgagee. It is held that the inhibition of the statute is to prevent such a conveyance as intends that the title when acquired from the United States shall become the absolute title of another person than the settler, and that a mortgage is not such a conveyance, since it is only a mere possibility that such a title may grow out of the mortgage by reason of the default of the mortgagor to pay the debt. Following are some of the expressions of the decisions upon this subject:

Kirkaldie v. Larrabee, 31 Cal. 456, 89 Am. Dec. 205:

149 "The title will not pass merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary con-

tract of the party in executing the mortgage. The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating by his own act the enforcement of the lien against the property thus mortgaged."

Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825: "The exemption in favor of the homesteader, found in section 2296, supra, 'that his land shall not become liable to the satisfaction of any debts contracted prior to the issuance of the patent therefor,' clearly was not intended to prevent him from creating by contract, for his own benefit, a special lien thereon. We think the obvious intention and meaning of that section is to protect the homesteader, and is in no sense a restraint upon him in the use of his land. Such is the universal rule of interpretation in construing exemption statutes, and such, we think, is the interpretation to be given section 2296 of the homestead act. The debts provided against by that section are those that may be enforced by general execution against the debtor, and not burdens imposed thereon by his own volition. We know of no instance where an exemption statute has been otherwise construed."

Wilcox v. John, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880: "It has been held in a few cases that a mortgage or a deed of trust upon land is a grant or conveyance within the meaning of the statute, and consequently void: Brewster v. Madden, 15 Kan. 249; Brake v. Ballou, 19 Kan. 397; Ainsworth v. Miller, 20 Kan. 220. And this seems to have been the ruling of the land department at one time, but as early as 1882, Mr. Teller, the Secretary of the Interior, called attention to the unsoundness of the prior decisions of the department, and in a carefully prepared opinion held that the mere possibility of a title resulting for the benefit of another person, as in the case of a mortgage, was not sufficient to prevent the pre-emptor ¹⁵⁰ from obtaining patent. The rule then announced has, we think, been uniformly followed by the department since. It is founded upon sound reasons, and in practice it has not infrequently been of benefit to settlers in negotiating loans to carry them over periods of drought, or of business depression, and should be maintained if not inconsistent with the terms of the statute, as it is of the highest importance that the decisions of the courts in these matters should be in harmony with the rulings of the land department."

Stark v. Duvall, 7 Okla. 213, 54 Pac. 453: "It is also pro-

vided in section 2296 of the Revised Statutes of the United States (upon homesteads) that 'no lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.' This section does not prohibit the borrowing of money at the option of the homesteader. It prohibits the land being taken from him for the satisfaction of past indebtedness. It is intended as a protection to the homesteader, and not as a limitation upon his control over the land, in disposing of or borrowing money upon it."

Fuller v. Hunt, 48 Iowa, 163: "The first question presented is, as to whether a person who has entered upon land under the homestead act can make a valid mortgage upon the same prior to the time when he is entitled to make final proof. It is claimed by the appellant that he cannot, because it is provided in the homestead act that the land shall not become liable to the satisfaction of any debts contracted prior to the issuance of the patent. The debt sought to be enforced was contracted prior to the issuance of the patent. It is abundantly evident that the land could not have been reached by general execution. If the land is liable at all, it is by virtue of the act by which the debtor undertook to create a special lien upon it, and we have to say that we think that the debtor's act had that effect. Mere exemptions from execution do not prevent the debtor ¹⁵¹ from creating such lien. Exemptions are provided merely for the debtor's protection. Such is the general rule, and such, it appears to us, is the intention of the homestead act. The only reason suggested why the claimant under the homestead act should not be allowed to mortgage his homestead is, that it would be against public interest. But the fact that the act provides against alienation by the claimant, and does not provide against mortgaging unless alienation includes mortgaging (a point which will be hereafter considered) indicates that it was not deemed to be against the public interest that the claimant should mortgage his homestead."

Spieß v. Neuberg, 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417: "While the title remains in the United States, it is undoubtedly true that 'no lands acquired under the provisions of' that law can 'in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.' Such is the statute: U. S. Rev. Stats., sec. 2296. This court has held that prior to such issuance of a patent such lands were not liable to attachment, execution, or mechanic's lien:

Gile v. Hallock, 33 Wis. 523; Paige v. Peters, 70 Wis. 178, 5 Am. St. Rep. 156, 35 N. W. 328. In the case last cited it is said in the opinion, in effect, that the right of the occupant of such lands to mortgage his interest in the same does 'not come within the prohibition of the federal statutes cited.' That assertion is not only sustained by the authorities there cited, but others. . . . We are not aware of any adverse decision in the supreme court of the United States."

Jones v. Yoakam, 5 Neb. 265: "As to the first objection to this mortgage we are of the opinion that it is not at all material when the debt was originally contracted, whether before or after the making of the final proof of settlement, etc. . . . All that Congress could have intended by this section [section 4 of the homestead act] was, that the owner of such homestead should not be deprived of the land by virtue of legal process founded on a debt contracted before the ¹⁵² patent has issued. It was not intended to do more than protect him against the compulsory payment of such a debt. Mark the language employed: 'No land . . . shall be liable,' etc.—that is, bound, or answerable, in law, or equity."

Thus it appears that the overwhelming weight of authority is in favor of sustaining mortgages executed prior to the issuance of a patent.

One other question remains to be discussed in this case. The answer avers that the mortgage was executed before actual entry was made, and it is suggested that the mortgagors had no interest whatever which could have been mortgaged. The only case herein cited in which this exact state of facts existed is that of Kirkaldie v. Larrabee, 31 Cal. 456, 89 Am. Dec. 205. In that case, the answer set up as a special defense that, after making the note and mortgage, Larrabee made an entry of the mortgaged premises under the federal homestead law; but the court sustained the mortgage. As heretofore stated, if the ordinary rule of estoppel is not invoked here, it must be because it is prohibited by the federal statute. But, since we have seen that the statute is not intended as a prohibition, the general doctrine of estoppel must apply to this as to any other case where lands are mortgaged by one not having title, but who afterward acquires title. When a person contracts an obligation to another, and grants a mortgage on property of which he is not then the owner, the mortgage is valid if the debtor ever afterward acquires the ownership of the property by any right: 2 Herman on Estoppel, p. 1018, sec. 895.

The judgment of the lower court, being in harmony with the weight of adjudicated cases, is therefore affirmed.

Reavis, C. J., and Fullerton, Anders, Dunbar, Mount, and White, JJ., concur.

A *Mortgage* given by one who has entered land as a homestead under the United States statute, and has acquired a receiver's final certificate, is valid, though executed prior to the issue of a patent: *Meinhold v. Walters*, 102 Wis. 389, 72 Am. St. Rep. 888, 78 N. W. 574. See, also, *De Laney v. Knapp*, 111 Cal. 165, 52 Am. St. Rep. 160, 43 Pac. 598; *Young v. Simpson*, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254, and note.

GEIGER v. KOBILKA.

[26 Wash. 171, 66 Pac. 423.]

EXEMPTIONS—Tailor.—Under a statute exempting from execution the tools and instruments of a mechanic “used to carry on his trade for the support of himself and family,” the tools and instruments of a tailor are exempt, although he is neither a householder nor the head of a family, where such an intention appears from the entire exemption law. (p. 735.)

THE WORD “AND” is Often Used Interchangeably with “or,” the meaning being determined by the context. (p. 735.)

L. A. Vincent, for the appellant.

Edward Pruyn, for the respondent.

172 HADLEY, J. Respondent instituted this suit to recover possession of certain personal property which had theretofore been levied upon and seized by the sheriff of Kittitas county under a general execution in favor of appellant. The complaint alleges that respondent is an unmarried man, and is not the head of a family, but is by occupation a mechanic, to wit, a tailor, and works as such for the support of himself; that he has a tailor-shop in the city of Ellensburg, where he is now, and has been, working at his said trade as a tailor in making and repairing clothing for those who employ him so to do; that the property levied upon consists of tools and instruments needed and used by respondent to carry on his trade for his own support, and also materials used for the same purpose; that none of said materials were kept for the purpose of sale, but were kept by respondent to be used by him exclusively in manu-

facturing suits of clothes and parts of suits of clothes for his patrons, and the same were at no time offered by him for sale except when manufactured by him into clothing for his patrons; that the judgment under which said execution issued was not rendered for the purchase price of any of said tools, instruments, or materials, and the same was not a lien thereon; that said property is of the value of five hundred dollars, and respondent has no other property and no other business or means of support for himself than the tailor business; that he has worked at said trade continuously for many years last past, and it is the only trade or business in which he can engage; that respondent filed with the sheriff a verified list of all the property owned by him, the same being a list of the property levied upon, and claimed said property to be exempt from execution, and ¹⁷³ demanded its release from the levy of said execution, which was refused. To the complaint appellant interposed a general demurrer which was by the court overruled. Appellant elected to stand upon his demurrer, and refused to plead further. Thereupon judgment was entered in favor of respondent, to the effect that he was the owner and entitled to the possession of the property involved. From said judgment this appeal was taken.

It is assigned as error that the court overruled the demurrer and entered judgment for respondent. The question presented involves the statute on the subject of exemptions, and calls directly for an interpretation of subdivision 6, section 5248 of Ballinger's Code. The said subdivision reads as follows: "To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars, in coin." It is insisted by appellant that the words "for the support of himself and family" must be construed as applying only to a mechanic who is a householder or the head of a family. It must be admitted that the language is such as may readily lead to discussion concerning the legislative intent. The whole section must, however, be construed together in relation to the subject matter under consideration by the legislature. The subject matter was the designation of the classes of persons who may avail themselves of the benefit of exemption from execution and attachment, and also the specification of the property which may in each case be claimed as exempt. The section begins as follows: "The following property shall be exempt from execution and attachment, ex-

cept as hereinafter specially provided." The first and second subdivisions then declare as exempt all wearing apparel of every person and family, and all private libraries, not to exceed in value five hundred dollars, and all family pictures and keepsakes. The section then ¹⁷⁴ proceeds: "3. To each householder," followed by a specification of the kind of property; "4. To each householder," followed by a further specification; "5. To a farmer"; "6. To a mechanic"; "7. To a physician"; "8. To attorneys, clergymen and other professional men." The above are followed by other like designations. Thus the designation of the classes of persons proceeds, and in each instance the property which may be claimed as exempt is specified. Subdivisions 3 and 4 relate to householders specifically as such. The remaining subdivisions relate to the farmer, mechanic, physician, attorney, clergyman, etc., without regard to whether he is a householder or not. In some instances where the family is mentioned the language is "for his support or that of his family," and in each instance where the family is mentioned at all, except in subdivision 6, the disjunctive "or" is used. It is in those cases too clear to admit of argument that the exemption runs to a person of the designated class when the property is used either for the support of himself or family. We cannot believe it was the legislative intent to favor all other classes mentioned and exclude the mechanic from a similar privilege. We certainly are not justified in so holding unless the language were so direct as to admit of no other holding. We think, therefore, that the words used as applying to a mechanic "for the support of himself and family" must be read in the light of the context, as meaning the same as similar words used in the same section applying to other persons. The word "and" is often used interchangeably with "or," the meaning being determined by the context: 1 Am. & Eng. Ency. of Law, 569, and notes; 17 Am. & Eng. Ency. of Law, 220, and notes.

"The popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments. ¹⁷⁵ While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context": Sutherland on Statutory Construction, sec. 252.

A common purpose seems to have been in the mind of the legislature, that of specifying certain trades or vocations to which an exemption belongs, and we do not believe the context justifies the interpretation that it was intended to subject the trade of the mechanic to a different rule from others mentioned.

We therefore conclude that the demurrer was properly overruled, and the judgment is affirmed.

Reavis, C. J., and Fullerton, Mount and Anders, JJ., concur.

Exemption Statutes are liberally construed in favor of those claiming their benefit: *Kirksey v. Rowe*, 114 Ga. 893, 40 S. E. 990, 88 Am. St. Rep. 65, and cases cited in the cross-reference note thereto. As to what are tools and implements of trade within the meaning of exemption statutes, consult the monographic note to *Kilburn v. Demming*, 21 Am. Dec. 545-554. It is held that only those articles specified by the statute can be held exempt: *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657.

IN RE CAVE.

[26 Wash. 213, 66 Pac. 425.]

ALIMONY—Jurisdiction.—A Court has Authority to Punish for Contempt by immediate imprisonment where the person was personally before the court at the time the order to pay alimony was made, had the money in his possession at the time, and refused to comply with the order. (p. 738.)

ALIMONY—Imprisonment for Debt.—A decree for alimony in a divorce proceeding is not a debt, within the meaning of a constitutional provision prohibiting imprisonment for debt. (p. 738.)

JURISDICTION—Divorce—Alimony.—While no express statutory authority is found for permanent alimony by that name after divorce, yet under a statute authorizing a court to make such disposition of the property of the parties as is just and equitable, it may require a stipulated sum to be paid monthly, or payment to be made in one lump sum. (pp. 739, 741.)

HABEAS CORPUS.—Any Error Committed in Decreeing Alimony in an action for divorce cannot be reviewed in habeas corpus proceedings. (p. 741.)

WHERE A STATUTE IS SILENT as to the Remedy, a court has inherent power to enforce its judgments or decrees according to its equity powers. (p. 742.)

A DECREE FOR ALIMONY may be Enforced by an Attachment for Contempt, even in the absence of statutory authority. (p. 742.)

R. H. Lindsay and F. H. Knapp, for the petitioner.

Humphries & Bostwick, for the respondent.

214 MOUNT, J. This is an application for discharge upon a writ of habeas corpus. The petitioner is imprisoned under an order of the superior court of King county, made upon conviction for refusal to obey an order of said court requiring petitioner to pay the sum of four hundred and forty-seven dollars to his divorced wife. From the return to the writ it appears that on the seventh day of February, 1900, in the case of Martha M. Cave against George B. Cave, petitioner herein, a decree of divorce was granted to plaintiff upon the grounds of cruel and inhuman treatment and failure to provide. The custody of three minor children was awarded to said plaintiff, and it was ordered in said decree "that the plaintiff, Martha M. Cave, have judgment against the defendant, George B. Cave, for twenty (\$20) dollars per month alimony from and after February 1, 1900," and "that plaintiff recover of defendant fifty (\$50) dollars attorneys' fees and costs and disbursements of this action to be taxed." The said defendant neglected and refused to pay any part of said money. On the twenty-ninth day of April, 1901, upon petition of the plaintiff therein, Martha M. Cave, the court issued an order directed to the said George B. Cave, requiring him to appear in said court on September 9, 1901, at 9:30 o'clock A. M., and show cause, if any he have, why he should not pay to the plaintiff or her attorneys three hundred and eighty dollars, accrued alimony, fifty dollars attorneys' fees, and seventeen dollars costs. The said defendant **215** appeared in person on said day, when, after an examination, the court entered an order as follows: "It appearing that the said defendant, George B. Cave, has money and property in his possession and under his control out of which he can pay the alimony, court costs, and attorneys' fees due the plaintiff under the judgment and decree heretofore made and entered in this cause, it is therefore ordered that the defendant forthwith pay to the said plaintiff, or her attorneys, alimony, court costs, and attorneys' fees, under the judgment and decree entered in this cause, amounting in the aggregate to the sum of four hundred and forty-seven dollars, and upon his failure so to do that he be committed to the county jail of King county, Washington, for contempt of court."

The defendant refused to comply with said order, whereupon the court issued a commitment, reciting the findings named, and ordered "that the defendant be, and he is hereby, committed to the county jail of King county, state of Wash-

ington, until the full sum of alimony, court costs and attorneys' fees set forth in the plaintiff's petition is paid." The commitment also contained a command to the keeper of the said jail to keep the said defendant until the further order of the court. The return further shows that the petitioner herein has not paid any of said money, and still refuses to comply with said order. Three questions were presented to the court upon the hearing of the application for discharge herein, as follows: 1. That the imprisonment for contempt could not be made because defendant had not been cited therefor; 2. That the decree of the court in the divorce proceeding was a judgment as for debt, and that defendant could not be imprisoned for failure to pay the same; 3. That the imprisonment is illegal, because the said superior court in the case of *Cave v. Cave* had no jurisdiction at the time of final decree to award alimony to the plaintiff ²¹⁶ therein, the payment of which may be enforced by attachment.

1. The record here discloses that the petitioner was personally before the court at the time the order was made requiring him to pay the said sum of four hundred and forty-seven dollars forthwith. It discloses that the court found that petitioner had the money in his possession and under his control at said time with which to pay the said sum, and also discloses that petitioner thereupon refused to comply with the order, and that the commitment was thereupon issued. These facts gave the court authority to punish by immediate imprisonment until the order was complied with; Ballinger's Code, sec. 5808.

2. It is the well-settled law of this country that a decree or order for alimony in a divorce proceeding is not a debt, within the meaning of that term as used in section 17 of article 1 of our constitution: *Audubon v. Shufeldt*, 181 U. S. 575, 21 Sup. Ct. Rep. 735; *Barclay v. Barclay*, 184 Ill. 375, 56 N. E. 636; 1 Ency. of Pl. & Pr. 439, and authorities there cited; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *State v. King*, 49 La. Ann. 1503, 22 South. 887.

3. The remaining question to be considered in this case is, Did the superior court, in the case of *Cave v. Cave*, have jurisdiction to make an order on final decree of divorce for alimony for the wife, and, if so, had it the power to enforce such order by attachment? It is argued by petitioner that all authority to decree alimony comes from the statutes, and that because the statutes provide for temporary alimony pendente lite, and do not provide for permanent alimony, such alimony is ex-

cluded, on the theory expressed in the maxim that the expression of the one excludes the other. We cannot agree with counsel for petitioner that the statute does not provide for such ²¹⁷ alimony. While no express authority is found in the statutes of this state for permanent alimony *eo nomine* after divorce, section 5723 of Ballinger's Code provides: "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

The court is here unrestricted as to the provision to be made for the maintenance of the minor children. The circumstances of each case alone determine what provision should be made for such children. In cases where there is no property and the parties have ability to earn money, the court is no doubt authorized to require a stipulated sum to be paid at certain intervals for the maintenance of such children. So also it will be readily seen that a wide discretion is given to the trial court to distribute the property of the parties. There are no restrictions upon the court as to the manner of such disposition. It may be disposed of in a lump sum, or by installments monthly or otherwise, and subsequently reduced to a lump sum, as in the case of *King v. Miller*, 10 Wash. 274, 38 Pac. 1020. This method of disposing of the property of the parties, call it alimony or whatever name you will, has been recognized by this court in a number of cases. In *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864, where the court said: "The law does not require an equal division of the property, but a 'just and equitable' division, and as no general rule for a just and equitable division can be laid down, but each case must be adjusted according to its own merits ²¹⁸ and the particular circumstances surrounding it, the court investigates all the circumstances."

In *State v. Sachs*, 3 Wash. 371, 28 Pac. 540, this court said: "If this is so, it seems clear to us that, whatever be the rule in an ordinary cause, in a divorce case the court must be held to have complete jurisdiction to dispose of such moneys as it may think just under all the circumstances. Such cases stand upon a different basis than do suits not of this nature. Our statute but re-enacts the general rule when it provides that all

the property of the respective parties to a divorce proceeding comes into the possession of the court, and is to be disposed of in accordance with its judgment."

In *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358, it was said: "There is no question but that the court had power in the divorce action to award the half belonging to the defendant, or any part of it, to the plaintiff."

In *King v. Miller*, 10 Wash. 274, 38 Pac. 1020, the court said: "It is further complained that that part of the decree which directed such gross sum should be paid to the plaintiff without any restriction as to the manner in which she should use the same, and without any conditions securing its disposition accordingly, was unauthorized and wrong. But it was certainly within the power of the court to make such decree, although the payment of such sum should have been regarded as a payment for the support of the children only."

In *Carney v. Simpson*, 15 Wash. 227, 46 Pac. 233, it was said: "It seems to us that this decree, fairly construed, awarded all of the community personal property of every name, nature and description to the plaintiff in the divorce proceedings."

And in *Smith v. Smith*, 15 Wash. 237, 46 Pac. 234: **219** "This case will be remanded to the lower court with instructions to change said paragraph to the effect that the care and custody of both the children mentioned in the decree be awarded to the defendant, and that the plaintiff be required to pay to the defendant, on the first day of each and every month, the sum of twenty-five dollars as alimony and for the support of said children awarded the defendant."

In the territorial court, in the case of *Madison v. Madison*, 1 Wash. Ter. 60, it was said: "By section 8 of the divorce act, the court is vested with discretionary power 'to make such disposition of the property of the parties as shall appear just and equitable,' etc. The court, in this instance, instead of granting a sum absolutely to the wife, has decreed that a certain sum shall be put into the hands of a trustee, the interest to be paid to the defendant, quarterly, during her natural life and at her death the principal to revert to the husband. This, we think, the court had power to do under the section of the act referred to."

In all these cases the rule was distinctly recognized that the court should make such disposition of the property as might appear just, and whether it was denominated alimony or divi-

sion of the property, the effect was the same. In the case of *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358, the rule was laid down that before the lower court would have jurisdiction to dispose of property such property must be brought before the court by suitable allegations. In the case of *Cave v. Cave*, it was alleged in the complaint that at the time of the commencement of this action the plaintiff and defendant owned certain community property situated in the city of Seattle, in King county, a part of which consisted of real estate, a part of personal property, and "that at the time of the commencement of the action the defendant George B. Cave was engaged in conducting and operating a sale and feed stable on First avenue south, in ²²⁰ the city of Seattle, King county, state of Washington, and had and owned at that time community property, consisting of horses, express wagons, carriages, harness, etc., of the estimated value of five hundred dollars, and the court found that after the commencement of this action the defendant, George B. Cave, sold and transferred all of the personal property consisting of horses, wagons, carriages, etc., for the sum of five hundred dollars in cash; that the said defendant, George B. Cave, kept the said five hundred dollars for his own use and benefit, and refused to give the plaintiff any part or portion thereof." This property was not disturbed in the possession of the said George B. Cave. The other property, however, in said case was awarded to the plaintiff therein. It will be readily seen that there was in the possession of the said George B. Cave, at the time of said final decree, the sum of five hundred dollars subject to be disposed of by the court. There is no question in this case that the court had jurisdiction of the persons of the plaintiff and defendant therein and of the property. It follows, from what we have said above, that the court had jurisdiction to dispose of all of said property as appeared just and equitable. If the court committed error in the disposition of the property by said decree, that error cannot now be reviewed in this proceeding: *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Ex parte Adams*, 25 Miss. 883, 59 Am. Dec. 234; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395. The court had jurisdiction to make the decree in *Cave v. Cave*, and that decree is valid and remains in full force and effect, not appealed from or modified in any way.

The next question is, Had it authority to enforce the payment of this sum by attachment? 2 *Bishop on Marriage*,

Divorce and Separation, at section 1092, says: ²²¹ "The attachment for contempt is a prominent method for enforcing the alimony decree with us. This proceeding partakes of the criminal quality, therefore the attachment does not issue as of course like an execution, but only on due notice of the award and on demand of payment, unless a prior refusal or something else renders them unnecessary. And one who cannot pay, if not otherwise in fault about the matter, will not be imprisoned under this process. Various circumstances and conditions of the law will require its rejection in favor of some other method": See, also, Stewart on Marriage and Divorce, sec. 378; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817.

We cannot agree with counsel for petitioner that the enforcement of the remedy as decreed by courts of general equity jurisdiction must be defined by statute. Where the statute is silent as to the remedy, the court has inherent power to enforce its judgments or decrees and orders according to its equity powers. The silence of the statute in this respect does not take away any power lodged in the court by its equity jurisdiction: 3 Pomeroy on Equity Jurisprudence, sec. 1318; 2 Daniel on Chancery Practice, sec. 1042 et seq.; 2 Bishop on Marriage, Divorce and Separation, sec. 1114; 1 Ency. of Pl. & Pr. 434, 437; *O'Callaghan v. O'Callaghan*, 69 Ill. 552. In this state no rule is provided by statute for the enforcement of such decrees, but the rule of attachment has been generally followed in the practice and approved by this court. In the case of *State v. Smith*, 17 Wash. 430, 50 Pac. 52, where the plaintiff was allowed by final decree twenty-five dollars per month as alimony and for the support of said children, this court said: "It is the duty of courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed, they should require and enforce such obedience by punishment for contempt."

²²² In the case of *State v. Ditmar*, 19 Wash. 324, 53 Pac. 350, this court said: "It will be conceded that, if it is out of the power of the party against whom the decree is entered to comply with its conditions, and this showing is made to the court, he has purged himself of the contempt. But the case cited is authority on the proposition that the remedies are cumulative, and that where other remedies exist, and the party has contumaciously refused to obey the decree of the court, he may be punished for contempt."

We are not disposed to depart from the rule in these cases. The case entitled *In re Van Alstine*, 21 Wash. 194, 57 Pac. 348, is cited as announcing a different rule. In that case, however, the court declared that the decree was for money, "a decree analogous to a money judgment at law which may be enforced by process against property," and for that reason it was held that the court was without power to require the money to be paid into court and enforce such payment by imprisonment.

The application for discharge must be denied, and petitioner remanded into custody.

Reavis, C. J., and Anders, Hadley and Dunbar, JJ., concur.

Habeas Corpus cannot be invoked to review mere errors and irregularities: See the monographic note to *Koepeke v. Hill*, 87 Am. St. Rep. 167-203.

Alimony—Contempt.—A court of chancery has power to enforce a decree for alimony by attachment for contempt: *Welty v. Welty*, 195 Ill. 335, 63 N. E. 161, 88 Am. St. Rep. 208, and cases cited in the cross-reference note thereto. Imprisonment for refusal to pay a judgment for separate maintenance is not an imprisonment for debt: *In re Popejoy*, 26 Colo. 32, 77 Am. St. Rep. 222, 55 Pac. 1083; monographic note to *State v. Brewer*, 37 Am. St. Rep. 763, 764. The power to punish for contempts is inherent in every court: *Bradley v. State*, 111 Ga. 168, 78 Am. St. Rep. 157, 36 S. E. 630.

HULL v. AMES.

[26 Wash. 272, 66 Pac. 391.]

MUNICIPAL INDEBTEDNESS.—Warrants Issued by a Municipality beyond the limit of the indebtedness authorized by its charter and the state constitution are valid in so far as they were issued for necessary expenses in maintaining the existence of the municipality. (pp. 746, 747.)

MUNICIPAL INDEBTEDNESS.—The Rule that a County may incur indebtedness for those expenses necessary to maintain its existence, after it has reached the limit of its indebtedness, is applicable to municipalities. (pp. 746, 747.)

Danson & Huneke and Winfree & McCroskey, for the appellant.

Robertson & Miller, for the respondents.

272 REAVIS, C. J. These cases were consolidated, and tried together. The town of Cheney is a municipal corpora-

tion organized under an act of the territorial legislature approved November 23, 1883, and amended December 23, 1885. The respondents are respectively the treasurer, mayor, and clerk of the municipality. Appellant Hull was the owner of a small warrant issued in August, 1892, which warrant was issued for services performed by a police officer. Appellant Gladwin was the owner of three city warrants—one issued for services performed by the treasurer, and two for services performed by the city marshal; and he was also the owner of other warrants, amounting ²⁷³ to over five thousand dollars in value, a large portion of which were alleged to be in payment for salaries of the marshal, treasurer, and clerk, and other officers of the municipality. All these warrants, after their issuance, had been presented for payment, and indorsements made thereon by the treasurer, "Not paid for want of funds." The warrants issued were in due form, and in accordance with the provisions of the charter of the city, and no call has ever been made for the payment of any of them. Prior to the commencement of these actions, demand for payment was made of the treasurer, and refused. In the year 1897 the municipality levied taxes for the following year as follows: For general municipal purposes, five mills on every dollar on the taxable property according to the assessment-roll for the year 1896, and also levied ten mills on the same property for special municipal purposes, for "the purpose of paying the water rate, and lighting the city, and paying interest on outstanding city warrants and bonds, and paying the indebtedness of the city." From the organization of the city to and including 1897 a tax has been levied for special municipal purposes and for general municipal purposes, and a part of the taxes so assessed have been collected, and the remainder are now being collected. The city has also fixed certain license fees, fines, and penalties which have been collected and are being collected, from all which sources of revenue the amount in the city's treasury is realized. In April, 1899, an ordinance was adopted directing that the sum of two thousand dollars be appropriated out of any money in the city treasury received from any source other than the general tax levy, semi-annual interest fund, or special road fund, not otherwise appropriated, and placed in a fund designated the "contingent fund." On April 10, 1899, by resolution of the council, the city treasurer was directed to redeem ²⁷⁴ two thousand dollars of the city's bonds, with interest, and pay the same out of the contingent fund; and

on the 6th of July, 1899, a similar resolution was adopted, instructing the treasurer to find certain warrants issued to judges, clerks, and other officers of election, and pay the same upon presentation. All of these warrants were issued subsequently to presentation for payment of the warrants held by appellants; and on July 6, 1899, one thousand dollars was transferred by resolution from the special municipal fund to the contingent fund. The treasurer is paying warrants out of the order of issuance or presentation under direction of the resolutions, and the city treasurer now has more than four thousand dollars in money levied and collected by the city for the purpose of paying its indebtedness. The suits were instituted for the purpose of enjoining the respondents from further paying warrants out of the order of their issuance, and the further payment of any sums on certain municipal bonds which are not yet due, and the prayer is for general relief.

The material defense interposed by respondents is the invalidity of the warrants owned by appellants. The above statement is based upon the findings of fact and admissions made in the record. The court found further that at the time of the issuance of the warrants owned by appellants the municipality was beyond the limit of its indebtedness authorized by its charter and under the constitutional limitation of one and a half per centum, and that no election had been held to validate any of the indebtedness; and, as a legal conclusion, found that at the time the warrants were issued the municipality had exceeded the limit of indebtedness which it was authorized to incur under its charter and the constitution of the state, that the act of its officers in incurring or contracting such indebtedness and issuing the warrants was void, and that respondents ²⁷⁵ were entitled to a decree dismissing the suits. It is not deemed necessary to review any exceptions made by appellants to the findings of fact, as the controversy may be determined upon the findings made and the conclusions of law. The material question presented is, Were the warrants owned by appellants issued for necessary expenses in maintaining the existence of the municipality? In other words, is the rule announced by this court as controlling such expenditures for counties applicable to municipal corporations such as the town of Cheney and others organized under the laws of the state? It is maintained by counsel for respondents that there is a distinction between a county and a municipal corporation; that such difference is founded in the origin of the county and the

municipality; that the municipal corporation is voluntarily organized, and the county is an involuntary quasi corporation. 3 Dillon on Municipal Corporations, 4th edition, section 23, *Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 109, and *Talbot County Commissioners v. Queen Anne's County Commissioners*, 50 Md. 245, are cited to illustrate the distinction. It is true that the functions characteristic of corporate existence conferred upon counties are fewer than those ordinarily possessed by municipal corporations. However, the powers conferred upon counties are continually increased, and the same may also be said of municipal corporations. Section 11 of article 11 of the state constitution recognizes and confers in some respects similar governmental powers on the county and municipal corporation as follows: "Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

276 The same restriction with reference to assessment and collection of taxes is imposed in section 12 of the same article: "The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations for county, city, town or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

There would seem to be reasons for the existence and life of the municipal corporation as a part of the governmental agency. In the case of *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 48 Pac. 253, there was a full review of the effect of the constitutional debt limitation in reference to certain compulsory expenditures made by the county. A recurrence to that decision indicates that many of the authorities referred to therein were cases involving the necessary expenses in maintaining the life of municipalities, and no distinction in principle is suggested between the county and the municipality. In *Duryee v. Friars*, 18 Wash. 55, 50 Pac. 583, the decision in *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 48 Pac. 253, was mentioned as follows: "What the court decided in that case was that where a county had reached the limit of its indebtedness it could thereafter issue its obligations for those expenses necessary to maintain its existence. . . . And with that holding we are well content, for that the maintenance of its government is of paramount importance needs no argument, and it cannot be done without money, or resorting to the county's credit in some way."

The essential powers reposed in municipal corporations by the constitution are necessary to the existence of the municipality. A number of warrants in suit owned by the appellants were found by the court to have been issued for that purpose. Those for services as policemen, marshal, ²⁷⁷ and treasurer come within the requirement of necessities. Without these the police powers of the municipality fail. Its capacity to assess and levy taxes ceases unless the officer may be compensated in the collection and disbursement of funds. It is concluded that the rule announced in relation to such necessary expenditures by counties in the maintenance of their existence is applicable to municipal corporations, and, as observed in *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 48 Pac. 253, "the payment of these is a prior obligation, and other liabilities incurred in the county are subject and inferior to its primary obligations, which must of necessity always continue." The findings before us are not specific as to the purpose for which all the warrants for which payment is claimed by appellants were issued.

The judgment is therefore reversed, and the cause remanded, with directions to the superior court to find the nature of all obligations for which the warrants in suit were issued, and that those issued for necessary expenses in maintaining the existence of the municipality be adjudged valid, and that respondents be enjoined from payment from the funds in the city treasury, raised to pay indebtedness, of warrants or indebtedness issued subsequently to appellants' warrants so adjudged valid.

Fullerton, Anders, Dunbar, and Mount, JJ., concur.

Municipal Indebtedness.—The constitutional and statutory limitations upon municipal indebtedness are considered in the monographic note to *Beard v. Hopkinsville*, 44 Am. St. Rep. 229-243. A contract imposing an obligation in excess of the prescribed limit is unenforceable: *McGillivray v. Joint School Dist.*, 112 Wis. 354, 88 Am. St. Rep. 969, 88 N. W. 310; *Keller v. Scranton*, 200 Pa. St. 130, 86 Am. St. Rep. 708, 49 Atl. 781. And it seems to make no difference whether the debts incurred are for necessary expenses or not: *Grand Island etc. R. R. Co. v. Baker*, 6 Wyo. 369, 71 Am. St. Rep. 926, 45 Pac. 494; *Laporte v. Gamewell etc. Tel. Co.*, 146 Ind. 466, 58 Am. St. Rep. 359, 45 N. E. 588; *Windsor v. Des Moines*, 110 Iowa, 175, 80 Am. St. Rep. 280, 81 N. W. 476; *State v. Helena*, 24 Mont. 521, 81 Am. St. Rep. 453, 63 Pac. 99. But see *Rauch v. Chapman*, 16 Wash. 568, 58 Am. St. Rep. 52, 48 Pac. 253.

CITIZENS' NATIONAL BANK v. LUCAS.

[26 Wash. 417, 67 Pac. 252.]

JUDGMENTS—Actions on.—A statute which provides that "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States," shall be brought within a stated time, applies both to foreign and domestic judgments. (p. 749.)

ACTIONS ON JUDGMENTS.—The Statute of Limitations commences to run on a domestic judgment as soon as it is rendered, and not after the expiration of the time during which execution may issue. (pp. 752, 755.)

ACTIONS ON JUDGMENTS.—At Common Law a party has a right of action upon his judgment as soon as it is recovered. (p. 753.)

ACTIONS UPON JUDGMENTS—Concurrent Remedy.—If the law gives to a judgment creditor a right of action upon his judgment, such right is not taken away by any concurrent remedy that may be given him. (p. 753.)

E. H. Belden and O. C. Moore, for the appellant.

Hoyt & Taylor and Crow & Williams, for the respondent.

417 DUNBAR, J. On the tenth day of April, 1894, the appellant obtained in the superior court of Spokane county two judgments against the respondent, C. F. Lucas. On the twentieth day of February, 1901, the appellant commenced an action against the respondent upon said judgments, setting out each as a separate cause of action. Thereafter respondent appeared and demurred to the complaint upon the ground that the action had not been commenced within the time limited by law. The demurrer was sustained by the court, and, the appellant electing to stand on its complaint, **418** an order of dismissal, with judgment against plaintiff for costs, was entered, to which judgment the appellant excepted, and brings the case here upon appeal.

The assignments of error are: 1. That the court erred in sustaining respondent's demurrer to appellant's complaint; 2. That the court erred in entering judgment in favor of respondent and against appellant. If the first assignment of error is sustained, it necessarily follows that the second must be, so that it is necessary to discuss only the first. The question presented by this appeal is whether or not an action can be maintained upon a domestic judgment commenced more than six and less than seven years after the date of its rendition. The statute (Ballinger's Code, sec. 4798) prescribes that

actions shall be commenced as follows: "Within six years: 1. An action upon a judgment or decree of any court of the United States or of any state or territory within the United States."

Provisions were made for the commencement of other actions within a limited time, and after reciting them in detail the statute concludes (section 4805): "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

It seems to us that the legislature in the passage of this act attempted to provide a limitation for every kind of action that could be brought in the courts, and that, if this case does not fall within subdivision 1 of section 4798, it must fall within the provisions of section 4805, last above noticed. But we think it falls within subdivision 1 of section 4798. It is contended that the wording of the statute does not embrace domestic judgments, but that subdivision 1 refers to judgments of states other than this state. ⁴¹⁹ This, it seems to us, is not a reasonable construction. In fact, the language is so plain that construction cannot be resorted to at all. "An action upon a judgment or decree of any court of the United States or of any state or territory within the United States," certainly comprehends the state of Washington; for it is a state within the United States, and the judgment is the judgment of a court of a state within the United States. The greater includes the less, and, under any canon of construction known to the law, it would seem that a judgment of this state fell within the provisions of the statute. The statute is broad enough to embrace judgments of this state, and the judgments of this state are in no way excepted from its provisions. So that it must be concluded that the legislature, in using the language which it did, intended to include not only foreign judgments, but domestic judgments, or intended to include, in the language of the statute, a judgment "of any court of the United States, or of any state or territory within the United States." It is contended, however, by the appellant, that this court placed another construction upon this statute in *Burns v. Conner*, 1 Wash. 6. 23 Pac. 836; and the language therein used would certainly justify this contention. The case, however, was decided before the question of limitation was reached, the court saying: "We are of the opinion that the proceeding prescribed by statute to revive the lien of a judgment is not the commencement of an action, but only a mode by which to secure the fruits of an action already had

and determined between the parties," and that section 27 of the code is not applicable thereto; citing authorities to sustain the announcement. The court then, after the cause had been decided, proceeded to say: ⁴²⁰ "We are also of the opinion that section 27 of the Code, limiting to six years the time within which an action may be commenced upon a judgment or decree of any court of the United States, or of any state or territory within the United States, when viewed in connection with chapter 29, does not apply to judgments by the courts of this state or of the late territory."

This was purely obliter dictum, and not in any way necessary to the decision of the case, although this question had been raised in the briefs of the contending attorneys. There does not seem to have been much consideration given to this question in that case, and the announcement is made that, when viewed in connection with chapter 29, section 27 did not apply to judgments of this state. But even if the announcement there made was a correct one under the provisions of chapter 29 as it then existed, the legislature afterward amended chapter 29 by placing a limitation of six years upon the motion to revive a judgment, so that if the idea of the court was that the limitation did not apply because there was no limitation on the revival of the judgment in chapter 29, spoken of, the reasoning would not now apply, because by the amendment of 1891 (Laws 1891, pp. 165, 166) a limitation of six years has been placed upon a motion to revive. The case of *Burns v. Conner*, 1 Wash. 6, 23 Pac. 836, has never been considered by this court as settling this question; for in *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767, which was an action upon a judgment rendered more than six years prior to the commencement of the action, the case was decided upon the ground that the defendants had been out of the state a portion of the time during which the judgment was running, and at the time said judgment was rendered, and did not return to the state under less than six years prior to the commencement of the action; "and." ⁴²¹ remarked the court. "this refutes the idea that the purported new matter set up in the answer is a defense to this action"—the new matter being the pleading of the fact that more than six years had expired between the rendition of the judgment and the action on the judgment. So it may be seen that, if the court had viewed the doctrine announced in *Burns v. Conner*, 1 Wash. 6, 23 Pac. 836, as the settled law of the state, it would not have been necessary to have entered into the discussion of the other questions involved

in the case. In *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519, substantially the same questions were raised as in *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767. The question having been raised that more than six years had expired between the entry of the judgment and the commencement of the action thereon, it was found by this court that the fact of absence from the state prevented the statute from running, and after settling that question it was said by the court: "This conclusion renders it unnecessary to determine the proposition of whether or not the six years statute of limitations applies to domestic judgments."

But aside from the fact that the plain language of the statute precludes any other idea, the authority is overwhelming to the effect that under similar statutes domestic judgments are included. It may be as well to state here that the cases of *Bettman v. Cowley*, 19 Wash. 207, 54 Pac. 1134, and *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216, cited by appellant, do not seem to us to be relative to the question under discussion. In those cases, while incidentally other propositions may have intervened, the question under discussion was the right of the revival of judgments under the statute limiting such rights. In Oregon, the rule has been announced that the ⁴²² statute did not apply to domestic judgments (*Murch v. Moore*, 2 Or. 189; *Strong v. Barnhart*, 5 Or. 499), and in one or two other states the same doctrine has been announced. But these cases are the exception, and not the rule. In *Reay v. Heazelton*, 128 Cal. 335, 60 Pac. 977, it was held that a domestic judgment was embraced within the language of a statute similar in all respects to ours. In *Haupt v. Burton*, 21 Mont. 572, 69 Am. St. Rep. 698, 55 Pac. 110, the supreme court of Montana, in discussing this question, says: "It is argued that section 41, division 1, of the Compiled Statutes of 1887, which provides that an action upon a judgment of 'any court of the United States or of any state or territory within the United States, shall be commenced within six years,' is inapplicable to judgments rendered by the courts of this state; and we are cited to *Pitzer v. Russel*, 4 Or. 129, and *Burns v. Conner*, 1 Wash. 6, 23 Pac. 836, which hold that way. The great weight of authority is against those decisions, and we believe that in the absence of any exception from the statute of actions upon judgments of the courts of this state, they are within the letter of the code"—citing *Hummer v. Lamphear*, 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865, approved in *Schuyler County Bank v. Bradbury*, 56 Kan. 355, 43 Pac. 254, and *Mason v. Cronise*, 20 Cal. 217.

In *Schuyler County Bank v. Bradbury*, just referred to, it is squarely decided that a right of action upon a domestic judgment whereon no execution had issued is barred by the five year statute of limitations. In *Mason v. Cronise*, 20 Cal. 217, it was held that judgments recovered in the courts of California were barred by the lapse of five years from the time they were rendered, which was the statute in that state corresponding to the six year statute in ours. The language of the court in that case is applicable, and we reproduce it here: ⁴²³ "The section does not, in terms, except judgments recovered within the state; but, on the contrary, its language embraces the judgments and decrees of any court of any state or territory within the United States. It would seem, according to the natural import of the words used, that there could be no question of the application of the section to domestic judgments."

To the same effect is *McDonald v. Dickson*, 85 N. C. 248, and *Rowe v. Blake*, 99 Cal. 167, 37 Am. St. Rep. 45, 33 Pac. 864. In conclusion, we think that both reason and authority compel us to hold that domestic judgments are included within the statute.

But it is contended by the appellant that the statute of limitations does not commence to run on a domestic judgment until the expiration of the time during which execution may issue; that is, after the lapse of five years from its recovery and entry. The statute provides (Ballinger's Code, sec. 4796) that actions can only be commenced within the period herein prescribed after the cause of action shall have accrued; and it is asserted that at common law an execution could issue upon a judgment at any time within a year and a day after its entry, and that the year and a day at common law correspond to our five years in which execution may issue. If this interpretation of the statute is correct, then the judgment in this case is not barred by the statute of limitations, for only seven years elapsed from the rendition of the judgment to the commencement of the action. But we think the contention that the judgment debtor cannot avail himself of the statute of limitations until after the time expires in which execution could issue cannot be maintained. It is true there are a few cases which sustain this contention, viz., *Lee v. Giles*, 1 Bail. 449, 21 Am. Dec. 476, where a few of the old English cases are referred to, and *Pitzer v. Russel*, ⁴²⁴ 4 Or. 130; also *Parks v. Young*, 75 Tex. 278, 12 S. W. 986, although the supreme court of Texas seemed afterward, in *Stevens v. Stone*, 94 Tex. 415, 60 S. W. 959, to over-

rule the proposition announced in *Parks v. Young*, 75 Pac. 273, 12 S. W. 986. The case of *Solen v. Virginia etc. R. R. Co.*, 15 Nev. 313, which announced the doctrine contended for by the appellant, has been overruled in the later case of *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849, and in the South Carolina case of *Lee v. Giles*, 1 Bail. 449, 21 Am. Dec. 476, it is stated in a note to the decision that the doctrine announced in that state could not be sustained by the authorities elsewhere, citing *Freeman on Judgments*, section 542. So that, outside of the states of Oregon, Nevada, Texas, and South Carolina, all of which, excepting Oregon, as we have seen, have to a certain extent receded from the proposition originally announced on this subject, the decisions are substantially uniform that at common law a party has a right of action upon his judgment as soon as it is recovered. It is true that in this state it has been decided that a party has a right to bring a common-law action upon a judgment simply because the common law prevails in this state in the absence of statutory enactment; but there has been statutory enactment on the subject of limitations, and, whether the action is brought under the statute or under the common-law right, the statute in relation to limitations equally prevails.

It is urged by appellant, and is stated in some of the cases cited, that there is no necessity for an action upon the judgment as long as the right of execution exists; that the only effect would be to impose additional costs and burdens upon the judgment debtor, and create a multiplicity of suits. But this objection is more fanciful than real, and the judgment debtor will be protected by ⁴²⁵ the ordinary prudence of the judgment creditor, who will not be likely to incur unnecessary expenses for the mere purpose of obtaining judgments against an insolvent debtor. But however that may be, if the law gives to the judgment creditor the right to bring an action upon his judgment, that right cannot be taken away, in the absence of any express restriction upon the right by any concurrent remedy that may be given him. In *Hansford v. Van Auker*, 79 Ind. 157, the right of the judgment creditor to sue was sustained, the court saying: "He may enforce its collection by the process of the court in which he obtained his judgment, or he may, if he elect so to do, use his judgment as an original cause of action, and bring suit thereon in the same or some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the

judgment last obtained as a cause of action on which to obtain the next succeeding judgment"—citing *Palmer v. Glover*, 73 Ind. 529. See, also, *Smith v. Mumford*, 9 Cow. 26; *Hale v. Angel*, 20 Johns. 342; *Mandlebaum v. Gregovich*, 24 Nev. 154, 50 Pac. 849—a case above referred to, where the court announced the rule that under the common law the right of action on an unsatisfied judgment was a matter of course, and that it was not necessary for the complaint to aver or the record to show that any other cause than nonpayment existed therefor. In 11 *Encyclopedia of Pleading and Practice*, commencing at page 1089, it is stated that: "At common law and by the overwhelming weight of authority in this country the right to maintain an action upon a domestic judgment is not at all dependent upon the right to issue an execution thereon. Thus an action may be maintained upon a dormant judgment, and it may equally well be maintained upon a judgment which is not dormant, and upon which execution might issue."

⁴²⁶ In support of this text cases are cited from Alabama, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts, Michigan, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Tennessee, Vermont, and the United States courts. In *Greathouse v. Smith*, 4 Ill. 541, the court, in delivering its opinion, said: "No rule of law is better settled than the one that an action of debt is maintainable on a judgment in a court of record. The judgment is a good cause of action, it being, as between the parties, the conclusive evidence of indebtedness. We know of no principle which inhibits the creditor, on a judgment which is in force and unsatisfied, from recovering in an action brought on it, although he may, at the time of bringing the suit, be entitled to an execution on his judgment. He is at liberty to proceed by execution to collect the judgment or institute a new action on it. Notwithstanding the second suit may be unnecessary, he has the clear legal right to recover, and the courts have no power to prevent him or impose terms on him for so doing."

In *Young v. Cooper*, 59 Ill. 121, it was said that the propriety of the above position has never been questioned. In some of the states it is provided by statute that an action shall not be maintained upon a judgment within a limited time, but in the absence of a statute the right exists at any time after the rendition of the judgment. The subject is summed up by Mr. Freeman in his work on *Judgments* (volume 2, fourth edition, chapter 17, section 432), where it is said: "In Connecticut, at a very

early date, an action on a judgment was not sustained, because it was deemed unnecessary and vexatious, unless plaintiff succeeded in showing that otherwise he could not have the full effect of his judgment. This position has since been abandoned in the same state, and in its place the true rule has been adopted—that 'no other reason' for bringing the action ⁴²⁷ 'need be stated in the declaration than that the judgment remains unpaid.' "

The right to the action having been given by statute, and there being no statutory restrictions upon the right, and the overwhelming weight of authority being to the effect that the action may be commenced at any time after its rendition, we do not feel justified in holding that the statute of limitations upon a domestic judgment does not commence to run until after five years from its rendition, or the expiration of the period in which execution might issue.

The judgment of the superior court is affirmed.

Reavis, C. J., and Anders, Fullerton, Mount, White, and Hadley, JJ., concur.

An Action Lies on a Judgment though it may be enforceable by execution: Eldridge v. Aultman, 35 Neb. 884, 37 Am. St. Rep. 476, 53 N. W. 1008; Rowe v. Blake, 99 Cal. 167, 37 Am. St. Rep. 45, 33 Pac. 864. Compare Stevens v. Stone, 94 Tex. 415, 86 Am. St. Rep. 861, 60 S. W. 959. And the action may be brought as soon as the judgment is rendered: Morse v. Pearl, 67 N. H. 317, 68 Am. St. Rep. 672, 36 Atl. 255. It has been held, however, that the statute of limitations does not begin to run until the entry of the judgment on the record of the court: Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; nor until the expiration of the time for appeal: Feeney v. Hinckley, 134 Cal. 467, 86 Am. St. Rep. 290, 66 Pac. 580. In Texas, an action on a judgment is not barred until the lapse of the period of limitation from the time of issuing the last execution: Stevens v. Stone, 94 Tex. 415, 86 Am. St. Rep. 861, 60 S. W. 959. A statute providing that an action on a judgment of any court of the United States, or of any state or territory therein, shall be commenced within six years, applies to judgments rendered by the courts of the state enacting the statute: Haupt v. Burton, 21 Mont. 698, 69 Am. St. Rep. 698, 55 Pac. 110.

GEORGE v. BUTLER.

[26 Wash. 456, 67 Pac. 263.]

LIMITATION OF ACTIONS.—A Subsequent Grantee of a Mortgagor, not obligated to pay the debt, may plead the statute of limitations against an action to foreclose the mortgage, although the statute has not run as against the mortgagor and maker of the note secured thereby, by reason of his absence from the state. (pp. 758, 763.)

WHEN A DEBT SECURED by a Mortgage is Barred by the Statute of Limitations, the mortgage is also barred, and the mortgage cannot be revived by the act of the mortgagor as against a subsequent grantee without his consent. (p. 759.)

LIMITATION OF ACTIONS.—Where a Mortgage is Given to Secure Several Notes which fall due at different dates, the statute of limitations commences to run as to each note as it matures, and is not postponed until the maturing of the last note. (p. 764.)

INTEREST.—Mortgaged Lands in the Hands of Subsequent Purchasers are not bound for a greater rate of interest than that stipulated in the mortgage as recorded, unless the purchaser has agreed to pay a greater rate. (p. 765.)

Whitney & Headlee, for the appellant.

Francis H. Brownell, for the respondents.

457 HADLEY, J. This is an action foreclosing a mortgage. It appears by the complaint that on the sixteenth day of February, 1892, the defendant, W. E. Gaynor, executed and delivered to Wyatt J. Rucker and Bethel J. Rucker certain promissory notes as follows: One note for three thousand dollars, due eighteen months after date; and one for sixteen hundred and sixty-six dollars and sixty-seven cents, due two years after date. By the terms of the notes each drew interest at the rate of eight per cent per annum from date until maturity, and after maturity at the rate of three per cent per month, payable monthly. On the same day the notes were executed the said defendant executed a mortgage upon certain real estate in the city of Everett to secure the payment of the notes. No part of said notes has been paid except the sum of five hundred and eighty-three dollars and thirty-four cents, which was paid upon the last-mentioned note on the twenty-fourth day of February, 1894. It is alleged that on the twelfth day of November, 1895, the said payees and mortgagees assigned and transferred the said notes and mortgage to the plaintiff in this suit, and that he is now the holder thereof. The complaint alleges that the defendant Gaynor, the maker of said notes and mortgage, was absent from

the state of Washington at the time said notes became due, and that he has not returned to this state since right of action upon the notes and mortgage accrued. The respondents, Lucy A. Friedlieb and Mary M. Butler, subsequently, by deed, became the owners of separate portions of the mortgaged premises. Said respondents demurred to the complaint by way of general demurrer, and also by way of interposing the statute of limitations. The demurrer was by the court overruled. Respondents then answered the complaint, denying certain allegations therein, and alleged affirmatively, among other things, their ownership of portions of the mortgaged premises, and that the ⁴⁵⁸ action was not commenced within the time limited by law as to said three thousand dollar note, in that no payments were ever made upon said note, and more than six years elapsed since the maturity thereof before this action was commenced. The reply denies the affirmative allegations of the answer. Upon these issues the cause was tried by the court, and decree entered denying any recovery on the said three thousand dollar obligation, and granting a recovery upon the other note for the amount of its face less the said payment thereon, with interest computed at the rate of eight per cent per annum until the date of the decree. The plaintiff appeals and assigns as error: 1. That the court erred in refusing to allow the full amount of said three thousand dollar note, together with eight per cent per annum interest, and three per cent per month thereafter, compounded; 2. That the court erred in refusing to allow upon the other note interest at three per cent per month, compounded after maturity; 3. That the court erred in concluding as a matter of law that appellant was not entitled to have his mortgage foreclosed for the principal and interest due on the three thousand dollar note. The three thousand dollar note matured August 16, 1893, and the other one matured February 16, 1894. On the sixteenth day of August, 1899, six years had elapsed since the maturity of the three thousand dollar note, and on the sixteenth day of February, 1900, a like period had elapsed since the maturity of the other one. This action appears to have been commenced between the two last-mentioned dates. It is clear that under any view of the statute of limitations the smaller note was not barred at the time this suit was commenced, and the right of action to foreclose the mortgage, as far as said note was concerned, was not barred. Appellant urges that the three thousand dollar note was not barred by reason of the absence of the maker of the note from this state. It is true, under the

showing in this record, the ⁴⁵⁹ note was not barred as to Gaynor, the maker, and consequently the right of action to foreclose the mortgage was not barred if Gaynor had remained the owner of the mortgaged premises. Respondents are, however, subsequent grantees of the mortgaged premises, and they have interposed the plea of the statute of limitations as to a right of action against them for the foreclosure of the mortgage.

The principal question involved here is, Can the subsequent grantee of a mortgagor not obligated to pay the debt plead the statute of limitations against an action to foreclose a mortgage when the statute has not run, as against the mortgagor and maker of the note secured by the mortgage, by reason of his continued absence from the state? This precise question seems never to have been directly passed upon by this court. The relation of a subsequent grantee of a mortgagor to the running of the statute of limitations has not been the subject of harmonious decision among the courts that have considered it. Certain phases of the subject have heretofore been considered by this court. In *Damon v. Leque*, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485, a subsequent execution purchaser under a judgment against the mortgagor was made a party defendant in an action which was held to be one in foreclosure. The court in that case said: "The case turns upon the question of the right of the mortgagor to revive the mortgage after the bar of the statute had become complete, as against another party who had purchased the lands, but was not obligated to pay the debt. The authorities are conflicting upon this question, but the great weight sustains the defendants on the proposition. The mortgagor could no more revive the mortgage in such a case than he could give a new mortgage upon the land."

⁴⁶⁰ Again, in the case of *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, it was held that, where a note was secured by a mortgage executed by a man and wife upon community realty payments of principal or interest thereon made by the husband without the authority of the wife, after maturity, will not extend the time of the running of the statute of limitations as against the wife. The theory upon which the first case was decided was that, when the right of action as against the debt secured by the mortgage is barred, the right of action upon the mortgage itself is also barred. The latter case was decided upon the theory that part payment by one person, being equivalent to a new contract based upon an old consideration upon which a cause of action accrues at the time of payment, binds

only the person making the payment, or one whom he has authority to bind by a new contract to pay the balance.

In the case of Board etc. v. Presbyterian Church, 19 Wash. 455, 53 Pac. 671, the opinion contains a statement that may upon first reading appear to put the case in conflict with Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485, which had been previously decided. A similar state of facts existed in the two cases. In the later case the grantee of the mortgagor sought to raise the defense of the statute of limitations in this court. The defense had not been pleaded in the court below by way of answer, and the demurrer was only upon the ground that the complaint did not state facts sufficient to constitute a cause of action. It was held that, when the attention of the court is intended to be directed to the subject of the statute of limitations by way of demurrer, it must be so specially designated in the demurrer, that being a distinct and separate ground of demurrer as provided by statute. In discussing this subject the opinion states: ⁴⁶¹ "In the first place, a pleading of the statute of limitations is a privilege which is accorded by the law to the defendant—in this case the Presbyterian church—and it can avail itself of that privilege, or answer upon the merits, or default, just as it pleases. It is not a right which defendant Walter Morgan can receive the benefit of."

The further discussion of the subject, however, shows clearly that the court did not adjudicate the question of the statute of limitations, for the reason that it was not raised in the record. The case was in fact determined upon other grounds. There is, therefore, no conflict between that case and Damon v. Leque, 17 Wash. 573, 61 Am. St. Rep. 927, 50 Pac. 485. On the authority of the latter case it must be considered, therefore, at the outset of the consideration of this subject, as settled by this court, that, when a debt secured by a mortgage is barred by the statute of limitations, the mortgage is also barred, and the mortgage cannot be revived by the act of the mortgagor as against a subsequent grantee without his consent. In the case at bar the full statutory period had run against the mortgage debt if the debtor had remained within the state. Section 4808 of Balingier's Code provides as follows: "If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of

his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action."

By reason of the above provision the operation of the statute of limitations was suspended during the absence of the debtor from the state, and it is therefore clear that ⁴⁶² the right of action against him is not barred. The statute having been suspended as to the right of action against the debtor, was it for that reason suspended as to the right of action upon the mortgage against the subsequent grantee of the mortgaged land? The rule adopted by this court, as far as it has passed upon the right of a grantee to interpose the defense of the statute of limitations against an action to foreclose a mortgage, seems to be in harmony with that adopted by the supreme court of California. In *Wood v. Goodfellow*, 43 Cal. 185, a question similar to the one involved here was under consideration. The court there held that there is no difference in principle between the suspension of the running of the statute of limitations resulting from an express waiver and one caused by voluntary act in absenting one's self from the state. In order that the views and reasoning of the California court may more fully appear, we quote extensively from the opinion in said case, as follows: "If Goodfellow still held the equity of redemption, and if the action was against him alone, it is evident his absence from the state would afford a sufficient answer to the plea of the statute of limitations. So long as he retained the equity of redemption, and no other rights had intervened, by reason of subsequent liens or encumbrances, he had the power, by written stipulation under the statute, to extend the time within which the debt should not be barred, or he might suspend the running of the statute by his absence from the state. So long as his rights only were to be affected, it was within his power to suspend the operation of the statute, either by a written stipulation or by absenting himself from the state. But this court has repeatedly decided that as against subsequent encumbrances, or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises: *Lord v. Morris*, 18 ⁴⁶³ Cal. 482; *McCarty v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Lent v. Morrill*, 25 Cal. 500; *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, 26 Cal. 361; *Barber v. Babel*, 36 Cal. 11; *Sichel v. Carillo*, 42 Cal. 493. . . . The argument [of counsel] assumes that a subsequent holder of the equity of redemption, or a subsequent encumbrancer, stands in the shoes of the mortgagor, and cannot invoke the aid of the statute in the given case, because he could not.

But it is the settled doctrine of this court, as will be seen from the authorities above cited, that when third persons have subsequently acquired interests in the mortgaged property they may invoke the aid of the statute as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection; and we see no difference in principle between a suspension of the running of the statute resulting from an express waiver, and one caused by his voluntary act in absenting himself from the state. In either case it is the sole act of the mortgagor, performed at a time when he had lost his rightful control over the property, and when other interests had intervened, which ought not to be dependent for their protection on the conduct of the mortgagor. When the mortgagor has parted with his title to the property, and ceased to have any interest therein, those who have succeeded to his rights stand in the same relation to the mortgagee as if they had originally made the mortgage on their own property to secure the debt of the mortgagor. The mortgagor has no interest in the property, nor are they under obligation to pay his debt. Their property, however, is bound as collateral security for its payment, under the mortgage, which is a contract in writing, by which the property is pledged as a security for the debt. The mortgage, in such a case, has the same effect in law as if it had been originally made, as a separate instrument, by the parties succeeding to the rights of the mortgagor to secure his debt."

In *Anderson v. Baxter*, 4 Or. 105, a similar rule was announced. The court in that case observed: ⁴⁶⁴ "If the relief sought had been a decree in personam, the analogy would be sufficiently complete, and the period of such absence not be included as any part of the time limited. Such absence in that case would suspend, or at least affect the party's remedy, which is the only reason for the exception. In this case, the plaintiff can claim no remedy, except to have the property in question adjudged to be sold to satisfy the debt secured thereby. It was in effect a proceeding in rem, and the absence of the mortgagors did not interfere with the prosecution of his remedy, or render it less effectual. If the absence of the mortgagors in this case prevented the statute of limitations from running, then the same result would have followed if the premises had been sold to defendant the next day after the execution of the mortgage, and he had gone into possession and remained in possession thereof; and in fact, the statute would never run so long as the mortgagors should remain away from the state. Where a personal obligation is sought to be enforced, the provisions of sec-

tion 16 referred to would undoubtedly apply; but where the only remedy is against the property, which has a fixed situs, the construction contended for would be unreasonable."

It is suggested that the last-named case should be distinguished, because the remedy there was against the land alone, there being no personal obligation to pay the debt; and that when the mortgagor had conveyed the property, there was no longer any cause of action against him, and necessarily his absence from the state could not affect the running of the statute. We are not, however, impressed with the distinction sought to be made. If a personal obligation exists, and the maker thereof leaves the state, the remedy under the mortgage remains against the property, and may be enforced at any time when the obligation is due. It is with this remedy against the property alone that the grantee of the mortgaged premises is concerned. It is further suggested that the case of *Anderson v. Baxter*, 465 4 Or. 105, is inconsistent with *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, which was a case that went up to the supreme court of the United States from Oregon, and involved the consideration of the laws of Oregon on certain phases of the statute of limitations. The supreme court of Oregon had determined that under the statutes of that state a payment made upon a note after maturity by one joint obligor had the effect to bind the co-obligor or surety, and the question before the supreme court of the United States was the effect of the state law as construed by the supreme court of the state. We do not see that the cases are necessarily inconsistent. *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, involved the question of the power of one obligor by his act to continue an obligation against a co-obligor, who was bound equally with himself on the original obligation. But in *Anderson v. Baxter*, 4 Or. 105, the question was whether the act of the debtor in absenting himself from the state could affect the rights of one who was never in any way bound with him on an obligation. The difference was such that the supreme court of Oregon might adopt the two views as applied to the different facts without any inconsistency. This court, in *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, declined to follow *Cross v. Allen*, 141 U. S. 528, 12 Sup. Ct. Rep. 67, as declaring a rule applicable to this state. In *Fowler v. Wood*, 78 Hun. 304, 28 N. Y. Supp. 976, the supreme court of New York seems to have announced a rule in harmony with the California and Oregon cases. The opinion says: "Nothing appears in the evidence to arrest the operation of the statute as to the appellant, except the fact that, before the expiration of twenty

years, Ferris removed from the state. This act suspended the running of the statute as against him. Whether it also suspended the statute as to the cause of action against the owner of the mortgaged property is a question that, so far as my examination ⁴⁶⁶ goes, has not prior to this case been decided in this state. . . . The code provides that an action upon a sealed instrument must be commenced within twenty years after the cause of action accrued; but if, after a cause of action has accrued against the person, he departs from the state, etc., the time of his absence is not a part of the time limited for the commencement of the action. This provision very plainly has reference solely to a cause of action against the person who departs from the state. It does not suspend the operation of the statute as to a person liable on the same cause of action, who continues to reside within the state; nor was it intended to extend the time generally within which an action might be brought for the debt or the enforcement of a security collateral to the debt. It affects the remedy solely against the person who departs from the state."

We are not aware that the above case was ever reviewed by the court of appeals of New York. We are aware, as heretofore indicated, that some other courts have adopted a different rule from that announced in the above cases. But viewing the subject, as we do in connection with prior decisions of this court, we do not find it necessary to review those cases here. This court having already adopted the same view as that of the supreme court of California—that a debtor cannot revive a debt once barred as against a subsequent grantee of mortgaged premises without his due consent thereto—we are disposed to adopt here the reasoning of that court in *Wood v. Goodfellow*, 43 Cal. 185, as applied to the effect of the mortgagor's absence from the state upon the running of the statute of limitations. It is there held, as shown above, that there is no difference in principle between a suspension of the statute by express waiver and that caused by the mortgagor's voluntary act in absenting himself from the state; that in either case it is the sole act of the mortgagor, performed at a time ⁴⁶⁷ when he had lost his rightful control over the property, and when other interests had intervened which ought not to be dependent for their protection upon the conduct of the mortgagor. This is an action to foreclose a mortgage, and it therefore comes within the provisions of section 4798, subdivision 2 of Ballinger's Code, which limits the period to six years for bringing "an action upon a contract in

writing or liability, express or implied arising out of a written agreement."

More than six years having elapsed between the maturity of the three thousand dollar note and the commencement of this suit, the action is, therefore, barred as to the amount represented by said note, unless, for further reasons urged, it is excused from the operation of the statute. These we will now examine.

Appellant further urges that this mortgage was given to secure the payment of an entire sum, payable by installments, and that the action upon the mortgage is not barred as to any portion of the debt until the statute has fully run against the last installment. It is also suggested that the mortgage contains a covenant to pay the whole debt. The covenant is, however, limited to payment according to the terms of the notes. In this state, a mortgage is a mere lien upon the land to secure the payment of the debt. The debt secured in this case was evidenced by certain promissory notes or obligations described in the mortgage, which severally matured at different times. Each note was the foundation for a separate cause of action, and suit might have been brought upon each note as it matured without foreclosure, or the mortgage might have been foreclosed as to each note at any time after its maturity. Section 4796 of Ballinger's Code provides: ⁴⁶⁸ "Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued."

We think the rule of limitations must be held to apply to each note as it matures. The mortgage being a mere incident to the note, and its only purpose being to secure the same, it has fulfilled its purpose, as far as the debt represented by the note is concerned, when there is no longer a right of action upon the note. We think, therefore, that this action is barred as to the three thousand dollar note, and we need not discuss other objections urged as to why appellant cannot maintain an action thereon.

The remaining question is, Did the court err in refusing to allow interest in the full sum demanded by appellant? As heretofore stated, the notes were made to draw three per cent per month after maturity, compounded monthly. Respondents' counsel assert that the rate named is the equivalent of sixty-five and seven-tenths per cent per annum. The mortgage contains no reference to any increased rate of interest. It describes the notes as bearing eight per cent interest from date. Section 4535 of Ballinger's Code provides as follows: "All deeds, mortgages,

and assignments of mortgages shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office; and when so filed shall be notice to all the world."

We think a reasonable deduction from the language of the above statute is that subsequent purchasers, who are notified of the existence of the mortgage by its record, have a right to rely upon the terms of the mortgage so recorded. We are not called upon to pass upon this question as between the maker of the notes and the mortgagee. ⁴⁶⁹ No judgment in personam is here sought. Judgment in foreclosure against the lands in the hands of the grantees is all that is demanded. We, therefore, think the just rule is that the mortgaged lands in the hands of subsequent purchasers are not bound for a greater rate of interest than that stipulated in the mortgage as recorded, unless the purchaser may have assumed and agreed to pay a greater rate than may be stipulated in the notes, but not shown in the mortgage as recorded: 20 Am. & Eng. Ency. of Law, 599; Whittacre v. Fuller, 5 Minn. 508; Gardner v. Emerson, 40 Ill. 296; Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250. In this case the court allowed the amount of interest as shown by the mortgage of record, which, we think, was right.

The judgment is affirmed.

Reavis, C. J., and Fullerton, Dunbar, White, Anders, and Mount, JJ., concur.

A Mortgage Lives as Long as the note it was given to secure: Perry v. Horack, 63 Kan. 88, 88 Am. St. Rep. 225, 64 Pac. 990. And when an action on the note is barred, it has been held that the mortgage of the same date is barred: McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754. See, too, Denny v. Palmer, 26 Wash. 469, post, p. 766, 67 Pac. 268. Other cases hold that, although the note is barred the mortgage itself may be foreclosed: Demuth v. Old Town Bank, 85 Md. 315, 60 Am. St. Rep. 322, 37 Atl. 266; Colton v. Depew, 60 N. J. Eq. 454, 83 Am. St. Rep. 650, 46 Atl. 728.

DENNY v. PALMER.

[26 Wash. 469, 67 Pac. 268.]

STATUTE OF LIMITATIONS—A Mortgagor's Absence from the State does not Suspend the running of the statute of limitations as to a foreclosure of the mortgage, as against a subsequent grantee of the mortgaged premises. (p. 767.)

STATUTE OF LIMITATIONS.—A Subsequent Grantee of Mortgaged Premises who fails to record his deed is estopped to set up the statute of limitations against a foreclosure suit, brought within a reasonable time after notice of the grantee's rights is received, where the statute has not run as against the mortgagor by reason of his absence from the state. (pp. 767, 768.)

J. A. Coleman, for the appellant.

George E. Wright, for the respondent.

470 HADLEY, J. By the amended complaint in this cause it appears that respondent is, by purchase and assignment, the owner and holder of a certain note executed by one Orrie Beeman on or about the twentieth day of June, 1893. At the time of the execution of the note, a mortgage upon certain real estate in Snohomish county was given by the maker of the note to secure the same. Respondent is also the holder of the mortgage, and seeks to foreclose it in this action. The original complaint was against Beeman, the mortgagee, alone, but the appellant asked leave to intervene in the cause, which was granted, and thereafter the amended complaint was filed. The mortgage contains a covenant that, in the event of default in payment of the debt, it may be foreclosed, and the land sold to satisfy the principal and interest of the debt, together with any sum paid as taxes upon the mortgaged land by the mortgagee, and also for fifty dollars attorneys' fees. It is alleged that on the second day of April, 1900, respondent paid to the county treasurer of Snohomish county the sum of seventy-four dollars and thirty-six cents, as taxes upon the said mortgaged premises, which taxes were then due, owing, and delinquent, and were a lien upon the said premises paramount to the lien of the mortgage; that the said note became due on the twentieth day of ⁴⁷¹ December, 1893, but no part of the principal or interest thereon, or the sum paid as taxes or interest thereon, has ever been paid; that more than four years prior to the commencement of this suit the defendant Beeman, the maker of the note and mortgage, departed from the state of Washington, and ever since, for the

period of more than four years next prior to the commencement of this action, has resided outside the state of Washington, and has been continuously absent therefrom. Appellant demurred to the amended complaint on the ground that the action was not commenced within the time limited by law. The demurrer was by the court overruled, and appellant duly excepted to said ruling. Thereupon appellant answered, denying certain allegations of the amended complaint, and alleging affirmatively that on December 23, 1893, the said mortgagor duly conveyed by deed all the property described in the complaint to the appellant, who ever since has been, and now is, the owner thereof; that said deed of conveyance was, on April 19, 1900, duly filed for record in the office of the auditor of said county, and that this action has not been commenced within the time limited by law. Respondent interposed a general demurrer to the affirmative matter contained in the answer, which demurrer was by the court sustained, to which ruling the appellant duly excepted. Appellant thereupon elected to stand upon his said answer, and declined to plead further. The cause was tried by the court upon the issues thus presented, and decree entered foreclosing the mortgage for the amount of the principal and interest due upon said note, together with the amount paid as taxes, and for fifty dollars attorneys' fees, as provided in the note and mortgage. From said judgment this appeal is prosecuted.

Appellant's contention is that this action is barred by the statute of limitations. The action is not barred, as ⁴⁷² against the debtor and mortgagor, by reason of his absence from the state. The full statutory period has run, and the action would have been barred as against the debtor if he had remained continuously in the state. Appellant, as a subsequent grantee of the mortgaged premises, however, insists that the action is barred as to him, notwithstanding the mortgagor's absence from the state, and that the mortgagor's absence did not suspend the running of the statute as to a foreclosure against the mortgaged land. In *George v. Butler*, 26 Wash. 456, ante, p. 756, 67 Pac. 263, this question was fully discussed, and was there determined in accordance with appellant's contention. It must, therefore, be held here that this action is barred, unless the conduct of appellant himself has been such as should be held to have suspended the statute. That feature of the case we will now consider.

Appellant's answer to the amended complaint alleges that the deed by which the mortgaged premises were conveyed by the mortgagor to appellant was executed on the twenty-third day of December, 1893, but was not filed for record until the nineteenth day of April, 1900. The original complaint in this cause was filed April 13, 1900. Appellant's deed was not filed for record until six days after this suit was actually commenced. Respondent therefore had no constructive notice of the existence of appellant's rights in the mortgaged premises until after he had actually commenced this suit. There is no averment in the answer that respondent or his assignor had, prior to that time, received any actual notice of the fact that such a conveyance had been made, and nothing appears in the record showing such actual notice. It appears, therefore, that respondent did not know that he held a cause of action against appellant prior to the time the deed was recorded. He knew he held a cause of action against the ⁴⁷³ mortgagor, as to which the statute of limitations had not run because of the mortgagor's absence from the state, but he could not, under any principle of reason and justice, be chargeable with notice that appellant had any interest in the land, unless appellant's deed had been of record, or some actual knowledge of its existence had been brought home to him or to his assignor. We think under such circumstances it should be held that when the deed has not been recorded within the ordinary limitation period in ample time to permit the bringing of the action within that period, or when actual knowledge of the conveyance has not been brought home to the mortgagee or his assignee in sufficient time to permit the action to be brought within such period, then the grantee should be estopped from pleading the statute against an action which is promptly begun, and within reasonable time after constructive notice of the grantee's rights has been given by filing the deed, or after the mortgagee or his assignee has received actual notice of the conveyance. This principle was sustained in *Spaulding v. Howard*, 121 Cal. 194, 53 Pac. 563.

For the reasons last assigned, we think respondent was entitled to have this mortgage foreclosed; he was entitled to a decree establishing his lien for the amount of the mortgage debt, together with the taxes paid, and for attorney's fees provided in the mortgage. Such relief was granted him by the decree of the court below, and the judgment is therefore affirmed.

Reavis, C. J., and Dunbar, Fullerton, White, Anders and Mount, J.J., concur.

Limitations.—A *Subsequent Grantee* of a mortgagor, not obligated to pay the debt, may plead the statute of limitations against an action to foreclose the mortgage, although the statute has not run against the mortgagor and maker of the note: *George v. Butler*, 26 Wash. 456, 67 Pac. 263, ante, p. 756. But see the cases cited in the cross-reference note thereto.

COPLAND v. PIRIE.

[26 Wash. 481, 67 Pac. 227.]

A CONSTITUTIONAL PROVISION that no Act shall be Amended by Mere Reference to its title, but the act amended shall be set forth at full length, does not apply to supplemental acts not modifying the original act, nor to those merely adding new sections, nor to acts complete in themselves, not purporting to be amendatory. (p. 770.)

CONSTITUTIONAL LAW.—An Exemption Act not complete in itself, which ingrafts into a section of an existing statute an additional exemption which alters its scope and effect, is clearly amendatory, and to comply with the constitutional requirement must set forth the section amended at full length. (p. 770.)

S. D. King, for the appellant.

H. H. Herren and William B. Allison, for the respondents.

482 FULLERTON, J. The sole question presented by this appeal is the constitutionality of the first section of the act of March 11, 1897, entitled "An act relating to exemptions of personal property": Sess. Laws 1897, p. 93. The section is as follows:

"Section 1. There shall be exempt from execution and attachment to every householder in the state of Washington personal property to the amount and value of one thousand dollars (\$1,000) in addition to the property exempt under section 486 of volume 2 of Hill's Statutes and Codes of the State of Washington; provided that no property shall be exempt from execution for clerks', laborers', or mechanics' wages, earned within this state, nor shall any property be exempt from execution issued upon a judgment against an attorney on account of any liability incurred by such attorney to his client on account of any moneys, or other property coming into his hands, from or belonging to his client."

It is contended that the act violates, among others, section 37, article 2 of the state constitution, which provides that "no

act shall ever be revised or amended by mere reference to ⁴⁸³ its title, but the act revised or the section amended shall be set forth at full length." In construing similar constitutional provisions the courts seem generally to have held that this requirement does not apply to supplemental acts not in any way modifying or altering the original act, nor to those merely adding new sections to an existing act, nor to acts complete in themselves, not purporting to be amendatory, but which by implication amends other legislation on the same subject. On the other hand, the courts are equally emphatic that if the act is not complete in itself, and is clearly amendatory of a former statute, it falls within the constitutional inhibition, whether or not it purports on its face to be amendatory or an independent act: See cases collected in 23 Am. & Eng. Ency. of Law, 282, 283. The section in question, it seems to us, is not complete in itself. It does not purport to add an additional section to the statute relating to exemptions of personal property, but purports to, and does, ingraft into the section of the existing statute providing for such exemptions an additional exemption which alters its scope and effect. As such it is clearly amendatory of that section, and, to comply with the constitutional requirement, it should have set forth the section amended at full length: *Bierer v. Blurock*, 9 Wash. 63, 65, 36 Pac. 975. This view of this act was taken by the learned judge of the district court of Washington in construing the exemption statutes of this state with relation to the national bankruptcy act. With reference to the question he said: "A statute which is complete in itself is not repugnant to the provision of the state constitution above quoted merely because it changes the existing laws of the state, and by implication repeals prior enactments relating to the same subject: *Warren v. Crosby*, 24 Or. 558, 34 Pac. 661. But where, as in this case, the new act is not complete, ⁴⁸⁴ but refers to a prior statute, which is changed, but not repealed, by the new act, so that the full declaration of the legislative will on the subject can only be ascertained by reading both statutes, the very obscurity and the tendency to confusion will be found which constitute the vice prohibited by this section of the constitution": *In re Buelow*, 98 Fed. 86.

The order appealed from is reversed and the cause remanded for further proceedings.

Reavis, C. J., and Dunbar and Anders, JJ., concur.

The Titles of Statutes, in respect to their sufficiency under the requirements of the constitution, are discussed in the monographic notes to *Bobel v. People*, 64 Am. St. Rep. 70-107; *Crookston v. County Commrs.*, 79 Am. St. Rep. 456-486. Consult, also, the recent cases of *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691, 86 N. W. 737; *Boorum v. Connelly*, 66 N. J. L. 197, 88 Am. St. Rep. 469, 48 Atl. 955; *Isenhour v. State*, 157 Ind. 517, 87 Am. St. Rep. 228, 62 N. E. 40; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 87 Am. St. Rep. 918, 61 Pac. 258. This subject is further considered, with especial reference to amendatory statutes, in the monographic note to *Lewis v. Dunne*, 86 Am. St. Rep. 267-279.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

CREEL v. CHARLESTON NATURAL GAS COMPANY.

[51 W. Va. 129, 41 S. E. 174.]

GAS—Liability for Explosion of.—If a tenant opens the service pipe of a gas company and knowingly permits it to remain open and the gas to escape, and then causes an explosion by carelessly igniting such gas, his landlord cannot recover from the company the resulting damages, although such company was negligent in not having cut the gas off from the service pipe. (pp. 773, 774.)

NEGLIGENCE—Contributory—Proximate Cause.—One person has no right to take advantage of the oversight and knowingly be guilty of such an act of omission or commission as will cause damage to property in his charge, and then shift the burden therefor onto another, who, though careless, is guilty of no willful or damaging wrong. (p. 774, 775.)

NEGLIGENCE—Contributory—Proximate Cause.—If a person becomes aware of the thoughtless negligence of another which may result in harm to him, and it is in his power to prevent such harm, it is his duty to do so, otherwise his negligence becomes the proximate cause of the injury, and he cannot recover therefor. (p. 775.)

J. W. Kennedy, for the plaintiff in error.

Brown, Jackson & Knight, for the defendant in error.

129 DENT, P. T. M. Creel complains of a judgment of the circuit court of Kanawha county dismissing his action against the Charleston Natural Gas Company.

The facts are as follows: John J. Cavin, tenant of plaintiff, had natural gas put into plaintiff's building on Summers street, in the city of Charleston, for heating purposes. Several years before this suit he directed the defendant that he wanted it cut off. The defendant shut it off by closing the service pipe, but

did not cut it off at the street main. Cavin having re-rented the building directed a plumber in his employ to unscrew the arm of the service pipe that extended through the floor. He immediately discovered that the gas was still in the service pipe and was escaping therefrom under the floor. Instead of at once restoring the pipe into the condition he found it, he notified the gas company to turn it off at the street main. After some time the defendant managed to find the stopcock and turn off the gas, but in the meantime it had accumulated by escaping from the service pipe under the floor. Cavin threw a lighted match ¹³⁰ down the hole in the floor. An explosion followed which wrecked the building. The plaintiff brought this suit to recover his damages. The circuit court excluded his evidence and directed a verdict for the defendant. This is the sole ground of error. Plaintiff insists that he is entitled to recover both by reason of the original act of negligence of the defendant in not turning off the gas at the street main and also its delay in not turning off the gas promptly when notified that it was escaping. The plaintiff through his tenant Cavin, was perfectly aware of defendant's negligence, and yet he made no effort to prevent the escape of gas under his building, and then carelessly exploded it.

In his petition for an appeal the plaintiff says: "That when the said Ferguson unscrewed or detached said short perpendicular pipe extending up through the floor as aforesaid from the long service pipe extending from said stopcock in the alley into said building under the floor as aforesaid, he discovered the escape of gas, and calling the attention of said Cavin to the fact, Cavin at once sent to the defendant company's office, which was only some few steps from the building, to notify it of the fact that the gas was escaping and to come and shut it off from the building at once. In response to this message no one was sent by the company to shut off the gas, and after waiting a few minutes said Cavin and said Ferguson went in person to the defendant's office and impressed upon said Penhale and Snider, as such officers and managers of the company, to come at once and shut off said gas from the building, as there was great danger of explosion."

This is an admission that both Ferguson and Cavin were aware of the danger of explosion that had been caused in opening the service pipe. The proper thing for them to have done at once was to have restored the service pipe to the harmless condition in which they found it, and then to have notified the de-

fendant to turn the gas off at the street main. They turned the gas on. They should have turned it off. It is the legal duty of every interested person in discovering the negligence of another to use all reasonable means in his power to avoid the effects thereof, and if he does not do so, such negligence on his part becomes the proximate cause of any tort that may be occasioned thereby. The accumulation of the gas under the floor was occasioned by the negligence of Cavin and Ferguson in not immediately ¹³¹ closing the pipe opened by them after they were aware of the alleged negligence of the defendant, and the explosion was occasioned by the negligence of Cavin in throwing the lighted match into the gas after it had so accumulated. They will both know better next time. If our foreknowledge was equal to our after-knowledge, there are many wrongs that would not happen. Experience is a harsh but a sure teacher. These after-acts of negligence on the part of Cavin and Ferguson with full knowledge of defendant's negligence must be held to be the proximate cause of the explosion. They were the cause of it. For if they had not intervened notwithstanding the prior negligence of the defendant there would have been no explosion.

This case comes strictly within the principles settled in the case of *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914. This case is not governed by *Bartlett v. Boston Gaslight Co.*, 122 Mass. 209, for in that case it was not the fault of the tenant that the gas escaped into the house. It is otherwise here, as there was no leak in defendant's pipes until the tenant made one and he immediately became aware of the fact, and its dangerous character, and did not attempt to avoid the effects thereof by repairing it. It is precisely the same as if there had been a key or stopcock on the pipe, and on opening it he had found out that the gas had not been turned off of the service pipe, and instead of closing the stopcock, as he should have done, he left it open and the gas flowing in or under the house, and went to look up the defendant to turn it off at the main, and then returned, and being aware of the presence of the gas, carelessly ignited it. To allow a recovery under such circumstances would be a perversion of justice, and be rewarding the plaintiff at the expense of the defendant for the gross negligence of his tenant. One person has no right to take advantage of the oversight of another, and knowingly be guilty of such an act of omission or commission as will cause damage to property in his charge, and then shift the burden therefor from his own shoulders to those of such other who, though careless, was guilty of no will-

ful or damaging wrong. On the contrary, if a person becomes aware of the thoughtless negligence of another which may result in harm to him, and it is in his power to prevent such harm, it is his duty to do so, otherwise his negligence becomes the proximate cause of the injury, and he cannot recover therefor. Of what a man by the use of ordinary prudence may prevent, he has no right to complain. The tenant ¹³² could have done this. He did not do so. On the contrary, added flame to the fuel of his making, and his landlord must look to him and not to another for the damage resulting therefrom. The circuit court, therefore, committed no error in excluding plaintiff's evidence and directing a verdict for the defendant, and its judgment is affirmed.

A Gas Company is not liable to the owner of a house for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of a tenant in possession of the house: Bartlett v. Boston Gaslight Co., 117 Mass. 533, 19 Am. Rep. 421. Compare Koelsch v. Philadelphia Co., 152 Pa. St. 355, 34 Am. St. Rep. 653, 25 Atl. 522.

WHITE v. COOK.

[51 W. Va. 201, 41 S. E. 410.]

OFFICE—Contract for Sale of.—An agreement between a sheriff and his deputy, whereby the latter undertakes to perform all the services of the sheriff in a certain district, except the collection of a certain tax, in consideration that he shall have and retain all the fees and commissions arising from the work, and under which he is to pay the sheriff a stated sum at all events, is void as a sale, or farming, of part of an office. Had the agreement provided that the deputy should retain all fees and commissions collected, less the sum to be paid to the sheriff, it would have been valid. (p. 786.)

OFFICE—Contract for Sale of—Liability on Bond.—If an agreement and an official bond referring to and made a part thereof, between a sheriff and his deputy, stipulates that the latter is to perform all of the services of the sheriff in a certain district, in consideration that he shall pay to the sheriff a certain sum at all events, and be allowed to retain all fees and commissions collected and arising from the work, no recovery can be had upon the bond or otherwise for the money which the deputy agrees to pay his principal, as the contract is illegal as the sale of part of an office, but recovery may be had on the bond for the fees and commissions collected by the deputy, and as to them the contract must be regarded as relating to public funds, and in so far as it may affect them, is severable from the remainder of the contract, and to the

end that public interest may be protected, the contract and bond are valid as to such fund. (pp. 786, 789.)

OFFICE—Contract for Sale of.—While public policy forbids the sale of an office in whole or in part, it requires the protection and faithful application of the public revenue, and no contract between officers for the sale of an office can be so construed as to permit or affect the loss of public funds, or the funds of innocent persons in the hands of such officers, whether they be officers *de jure* or *de facto*. (pp. 790, 791.)

OFFICERS—Accounting by Deputy.—A bill in equity by a sheriff against his deputy for an accounting cannot be maintained without a showing that the accounts are complicated or intricate, or of special circumstances entitling him to discovery as necessary to adequate relief. (pp. 790, 791.)

J. W. Hale, for the appellant.

A. M. Sutton and C. W. Smith, for the appellees.

202 **POFFENBARGER, J.** James A. White was elected sheriff of Mercer county in 1896, and in January, 1897, with the consent of the county court of said county, he appointed T. B. Cook his deputy. The contract of service made between them is dated January 1, 1897, and, after reciting the election and qualification of the sheriff and appointment of the deputy, it reads as follows:

203 "Now, therefore, this agreement witnesseth, that the party of the second part agrees to do and perform all the work to be done by the sheriff of Mercer county as the law requires, in the district of Rock of said county; to attend upon the sessions of the courts of said county his proportional part of the time, but in no event to exceed one-third of the time of said courts, and to pay to said party of the first part one hundred (\$100) dollars per annum. The party of the first part reserves, however, in the collection of the taxes of said Rock district, the tax ticket against E. W. Clark et al., trustees. The party of the first part agrees that the party of the second part shall have all the fees and commissions arising from all work and labor so performed by him in and about his duties as such deputy sheriff of Mercer county in the said district of Rock, except the commissions of the said tax ticket of E. W. Clark et al., trustees, reserved as aforesaid. But in no event is the said party of the second part to have or receive any commissions on any sums not collected by him."

The sheriff took a bond from said deputy in the penalty of twenty-five thousand dollars and with numerous sureties. The condition of the bond reads as follows:

"The condition of the above obligation is such, that, whereas, the said James A. White was duly elected sheriff of Mercer

county, West Virginia, on the third day of November, 1896, whose term of office begins on the first day of January, 1897, and, whereas, said White with the consent of the county court of said county entered of record has appointed the above-bound T. B. Cook deputy sheriff for said county within Rock district said county, who is to perform such duties within said district, and receive such compensation and reward as is set forth in a written contract this day executed by and between said White and said Cook, and which is made a part hereof:

"Now, therefore, if the said T. B. Cook shall well and truly perform his duties as such deputy sheriff within said Rock district, and perform such work in court as set forth as above mentioned, then this obligation to be void; otherwise to remain in full force and virtue."

White died in September, 1900, and Cook served as deputy until after the date of the death of White, but just how long does not appear. Taxes and other demands amounting to a large sum of money went into his hands for the years 1897, 1898 and 1899, and no final settlement has been made between him ²⁰⁴ and the administrator of White. In the year 1900 E. E. White, as administrator with the will annexed of James A. White, deceased, instituted a suit in equity against Cook and all his sureties on the bond, alleging that the accounts between said decedent and the defendant Cook were mutual, that Cook was indebted to the estate of White on account of his deputyship in the sum of seven thousand five hundred dollars, and that discovery on the part of Cook was necessary to complete and adequate relief. The circuit court sustained a demurrer to the bill, being of the opinion that the bond and contract exhibited therewith were made in violation of the statute and public policy of the state, and are void. Leave was granted the plaintiff to amend his bill, and after the amended bill had been filed, the court sustained a demurrer to it on the same ground and dismissed it. The amendment consisted of an allegation that there was a sort of ante-election agreement between said sheriff and the voters of said Rock district that, in case of the election of White to the office of sheriff, he would appoint Cook deputy for that district, and that in pursuance of such understanding, Cook was appointed.

It is insisted here, as it was in the court below, that the contract between White and Cook amounted to a sale, or farming, of a part of the office of sheriff. Undoubtedly, this contract falls within the exact terms used in *Godolphin v. Tudor*, 2 Salk.

468, decided under the reign of Queen Anne, which is everywhere considered the leading case on the subject. On a writ of error to the house of lords the judgment was affirmed: 1 Brown P. C. 135. In the report of the case found in Salk. it is said: "The court held that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits rise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to the fees, they still continue to be the principal's; so that as to him, it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute." ²⁰⁵ The statute referred to is 5 and 6 Edward VI, chapter 16. Godolphin, being the auditor of Wales, made Tudor his deputy, and they entered into an agreement by which the deputy was to have all the fees, and, in consideration thereof, pay his principal two hundred pounds per annum and save him harmless. In *Greville v. Atkins*, 9 Barn. & C. 462, the same conclusion is reached under the statute (49 George III, chapter 126). Other English cases bearing on the subject of sales of offices are *Parsons v. Thompson*, 1 H. Black. 322; *Garforth v. Fearon*, 1 H. Black. 327; *Lockner v. Strode*, 2 Ch. Cas. Ch. 48, as explained by Lord Loughborough in *Garforth v. Fearon*, 1 H. Black. 327; *Juxton v. Morris* 2 Ch. Cas. Ch. 42; *Blachford v. Preston*, 8 Term Rep. 89; *Hanington v. DuChattel*, 1 Brown Ch. 124. A careful examination of these cases leads to the conclusion that the whole doctrine of the English law concerning sales of offices and deputations is based upon the statute, 5 and 6 Edward VI, chapter 16, and other statutes which forbid and make illegal the sales of certain offices. There is no clear intimation that by the English common law the sale of an office or deputation was illegal. Lord Kenyon said in *Blachford v. Preston*, 8 Term Rep. 89: "Up to a certain extent the legislature have interfered and prohibited by statute 5 and 6 Edward VI, the sale of some of the offices; but whether or not that act of parliament were necessary for the purpose, I will not now inquire." In *Garforth v. Fearon*, 1 H. Black. 327, in which the customer of a port, having before his appointment

agreed to hold the office in trust for another party, and appoint such deputies as the other party should nominate and would empower said other party to receive the profits of the office to his own use, an action of assumpsit was brought on the agreement. The contract was held to be void, and Lord Loughborough said: "I should, therefore, not find much difficulty to conclude, if there were nothing more in the case, that the common law would not support an assumpsit on such an agreement. But I think it is clearly void by positive law respecting this office. The appointment of any customer by any means contrary to the statute 12 Richard II, chapter 2, is a misdemeanor. That statute, though very ancient, is certainly not obsolete; it is the statute under which they are sworn in the exchequer. It not only prohibits the appointment, but goes on to say that 'none that pursueth by him or by others, privily or openly, to be in any manner of office shall be put in the same office or in any other,' and the statute 5 and 6 Edward VI, chapter 16, makes ²⁰⁶ void all promises, bonds and assurances, as well on the part of the bargainer, as the bargainee."

The English rule is generally recognized and applied by the American courts: Throop on Public Officers, sec. 579; 9 Am. & Eng. Ency. of Law, 2d ed., 376. In Georgia, Kentucky, North Carolina, New Hampshire and Virginia the courts have applied the English statute, 5 and 6 Edward VI, chapter 16, and the doctrine of the English courts: Grant v. McLester, 8 Ga. 553; Outen v. Rodes, 3 A. K. Marsh. (Ky.) 433, 13 Am. Dec. 193; Love v. Buckner, 4 Bibb (Ky.), 506; Davis v. Hull, 1 Litt. (Ky.) 9; Baldwin v. Call, 2 J. J. Marsh. (Ky.) 8; Noel v. Fisher, 3 Call, 216; Meredith v. Ladd, 2 N. H. 517; Carleton v. Whiteher, 5 N. H. 196; Cardigan v. Page, 6 N. H. 182; Haralson v. Dickens, 4 N. C. 163. In other states statutes have been passed founded upon that of 5 and 6 Edward VI, chapter 16, notably New York, Virginia and Wisconsin: Becker v. Ten Eyck, 6 Paige (N. Y.), 68; Tappen v. Brown, 9 Wend. 175; Mott v. Robbins, 1 Hill, 21 37 Am. Dec. 286; Adington v. Sexton, 17 Wis. 327, 84 Am. Dec. 745; Salling v. McKinney, 1 Leigh, 42, 19 Am. Dec. 722; O'Rear v. Kiger, 10 Leigh, 653; Va. Code 1819, p. 559, c. 145; Rev. Rep., c. 12.

The tenacity with which the courts adhere to the English rule where they recognize the English statute, and it has not been modified in any way, will be seen by reference to some of the cases cited. In Grant v. McLester, 8 Ga. 553, the clerk of an inferior court appointed a deputy, agreeing to give him for

compensation all the fees and costs already accrued, and which were thereafter to accrue, and the deputy agreed to pay his principal five hundred dollars out of the fees and costs thereafter to accrue, and gave his notes to secure the payment of the same. The court held that it was an agreement to pay the five hundred dollars at all events, and was not limited to payment out of the fees, and was therefore void. In *Ferris v. Adams*, 23 Vt. 136, the action was upon a note for thirty dollars given by a deputy sheriff to his principal upon the occasion of his being appointed to the office, and the court held the contract void, basing its decision upon the English cases and many of the American cases here cited. In *Noel v. Fisher*, 3 Call, 215, the action was debt upon a bond given by a deputy sheriff, in the condition of which it is recited that, for the perquisites and benefits of the office, the deputy agrees and binds himself to pay the sum of thirty-five ²⁰⁷ pounds on specified days, and the court held that the contract was void under the British statute of Edward VI.

The contract between White and Cook, in so far as it relates to the amount which Cook agreed to pay White, is clearly within the principles of law against the farming of offices. But the principal question in the case is, whether the action may be maintained upon the bond for the recovery of the taxes and other moneys which went into the hands of Cook by virtue of his deputyship. It is insisted here that the contract of appointment to the office of deputy being illegal and void, all contracts and transactions in pursuance and furtherance thereof are void. This contention is borne out by some of the American cases. No English case is recalled in which that question arose. They were all actions or suits differing very materially in their facts and legal status of the parties from this case. In *Lewis v. Knox*, 2 Bibb (Ky.), 453, the court held that the bond taken for a sum given for the sale and purchase of an office is void, but whether it was intended to hold in that case that the bond was void for all purposes or only as to the illegal consideration, does not appear. In the opinion it is said: "So far as the condition of the bond is to perform the duties of the office of sheriff and keep the principal indemnified, there is clearly nothing in it illegal. For as the sheriff may lawfully appoint a deputy, it would be unreasonable not to permit him to take security for his indemnity against any violation of the duties of the office by the deputy." But in *Love v. Buckner*, 4 Bibb (Ky.), 506, the court met the point squarely, and decided that the bond was invalid for any purpose and all respects, the court said: "The

bond we suppose not to be of the character of those declared void by the statute 5 and 6 Edward VI, chapter 16. That statute more properly applies to bonds securing the payment of anything agreed to be given for an office, and should not be construed to embrace bonds conditioned exclusively for a faithful discharge of the duties of an office. . But although there is no stipulation in the bond repugnant to the provisions of the statute, yet as by a recitation in the condition the deputation of the office appears to have been sold by Love to Buckner, it becomes material to inquire whether upon common-law principles the bond can be sustained. The sale of the deputation must have caused the execution of the bond; and as the sale is expressly interdicted by the statute, the consideration of the bond is against law, and ²⁰⁸ consequently the bond itself inoperative." In *Davis v. Hull*, 1 Litt. (Ky.) 10, the action was on the bond of a deputy sheriff for breaches of its condition for the faithful performance of the duties of the deputy, and a plea was interposed, alleging that Davis, the sheriff, on the day of the date of the bond, sold the deputation of the office to Hull for the sum of ——— dollars, and it was held that the facts alleged in the plea formed a valid bar to the plaintiff's action on the bond. Another case which goes probably further than any of these is *Cansler v. Penland*, 125 N. C. 578, 34 S. E. 683, decided in December, 1899. There the sheriff, being the tax collector of the county, made a contract with another person by which it was agreed that the latter should collect the taxes for the years 1891 and 1892 and receive a commission of two and one-half per cent for making the collections. The tax list was delivered to him and he collected the taxes, and in 1894 the sheriff brought an action against him, and recovered a judgment for ninety-three dollars and two cents. On appeal the judgment was reversed on the ground that the contract was illegal. A circumstance which distinguishes this case from all the Kentucky cases is that the party who was employed to collect the taxes, and to whom the sheriff endeavored to delegate his authority in that respect, does not appear to have been appointed a deputy. However, the decision does not seem to rest upon that circumstance. The court regarded it as an unauthorized delegation of authority, amounting to a farming out of the office. Redfield, Judge, in *Ferris v. Adams*, 23 Vt. 136, refers to the Kentucky case of *Love v. Buckner*, 4 Bibb (Ky.), 506, in which the court held the bond given to indemnify the sheriff void, and says: "We should not, perhaps, be prepared to go to that length." There

is no Virginia case in which the bond given by a deputy, conditioned for the faithful performance of his duties and to indemnify the sheriff, has been held invalid, as to the indemnity, on the ground of a sale of the deputation. On the contrary, in *Salling v. McKinney*, 1 Leigh, 42, 19 Am. Dec. 722, the court virtually repudiated the English doctrine, in so far as it relates to sales of deputation in the office of sheriff. That was the first case involving the question of the sale of a deputation, in which the purpose of the action was to recover for breaches of the condition to faithfully perform the duties of the office and indemnify the sheriff against loss. *Hoge v. Trigg*, 4 Munf. 150, was an action by a deputy sheriff against his principal for damages, on the contract ²⁰⁹ between them for removing the plaintiff from his office in violation thereof. *Noel v. Fisher*, 3 Call, 21, was for the recovery of the purchase money of the deputation. *O'Rear v. Kiger*, 10 Leigh, 653, was an action brought by Kiger against O'Rear's administrator for the breach of an agreement by O'Rear, in consideration of money, to appoint Kiger his deputy. In *Hoge v. Trigg*, 4 Munf. 150, the declaration showed that Hoge, by their agreement, was to pay Trigg for the fees and profits of his office one hundred dollars. Several pleas in bar were interposed, and, among others, that Hoge had been guilty of certain misfeasances and improprieties in office, which was held to be a bar to his action. On a writ of error to this judgment it was affirmed. The supreme court of appeals waived the question whether the contract was void because of the agreement to pay the sheriff a certain sum of money for the fees and profits of the office. This case was decided twelve years later than that of *Noel v. Fisher*, 3 Call, 215.

Salling v. McKinney, 1 Leigh, 42, 19 Am. Dec. 722, arose after the passage of the Virginia statute found in 1 Revised Code of 1819, taken from the British statute of Edward VI, and it was held that the sale of deputation of a sheriff's office was not within the inhibition of that statute. That statute provided in section 3 that "every such bargain, sale, promise, bond, covenant, agreement and assurance, as before specified, shall be utterly void and of no effect," but it also contained in the fourth section this proviso: "Provided always, that nothing in this act contained shall be so construed as to prohibit the appointment, qualification, and acting of any deputy clerk, or deputy sheriff, who shall be employed to assist their principals in the execution of their respective offices." Judge Carr said, in his dissenting

opinion, that this proviso did not so operate as to take the sale of a deputation in the office out of the statute. But Green, J., and Brook, P., while admitting that such sale was clearly within the terms of the first section of the act, held that the proviso did so operate. The former said, after discussing the statute: "These considerations would incline me strongly to the opinion, if we were not to look beyond the terms of the statute itself, that the sale of the deputation of the offices of clerk and sheriff was not embraced by the statute. Other circumstances lead to the same conclusion." The principal one of these considerations was stated as follows: "The only case in which a deputation of the office could come within the enacting clause ²¹⁰ is that where the deputy paid, or agreed to pay for it, a gross sum, at all events, and independently of the amount of the fees, and if the proviso does not except such a case, it has no effect whatever." He then reviews the history of the sheriff's office in Virginia, and among other things, says: "The office of sheriff, devolving on them (the justices) in succession, generally comes to them at an advanced age, and when they are unfitted from that cause, as well as from their previous course of life, and other occupations, to discharge in detail the duties of the office, or even to superintend personally the discharge of those duties by others; and they have, as was to be expected, almost invariably, so far as I am informed, and as, indeed, is perfectly notorious, farmed their offices to others, without being conscious of violating any law, either municipal or moral. This practice must have been well known to the legislature, which enacted the law in question. And this induces a belief that the proviso was intended to except the deputation of this office from the general terms of the statute." The reasoning of Brook, P., was much the same. The law, as settled by this case, so remained until 1849, when the revisers recommended that the office of deputy sheriff be expressly excepted from the statute prohibiting sales of offices and deputations thereof, saying: "More than one hundred years ago when a deputy sheriff who had given bond to the high sheriff, to indemnify him and pay him fifteen hundred pounds of tobacco, pleaded the statute of 5 and 6 Edward VI, and averred the tobacco to be for the deputation, the plea was adjudged in Virginia to be bad: *Goodlow v. Dudley*, Jeff. 59. And more recently the practice which prevails in Virginia of farming the sheriffalty was sanctioned in *Salling v. McKinney*, 1 Leigh. 42. 19 Am. Dec. 722. This being the case, it is deemed better to make the statute conform

to the practice and the adjudications sanctioning that practice, than to retain merely the language of the 4th section of the act in 1 Revised Code, 559": Rev. Rep. 49. It will be seen by reference to the Code of 1860, chapter 5, section 6, that, in pursuance of this recommendation, the office of deputy sheriff was expressly excepted from the general statute, section 5 of same chapter, against selling or farming of the offices or deputations thereof. This exception became a part of the law of this state and so remained until 1868, when said section was stricken out and section 5 amended so as to read as follows: "If any person ²¹¹ holding, or expecting to hold, any office under the laws of this state sell the same, or let it to farm, either in whole or in part, or contract to do so, such person and the person who may buy, take to farm, or contract to do so, shall be thereby disabled from holding said office." Our present statute on the subject is in the same terms, and it is worthy of notice that it is a substantial modification of section 5 of chapter 12 of the Code of 1860 in this, that the words "or the deputation thereof," found in the old statute, are omitted from our present statute. How much weight this omission is entitled to in the construction of that statute, it is difficult to say. But if the process of reasoning, adopted in *Salling v. McKinney*, 1 Leigh, 42, 19 Am. Dec. 722, should be applied here, it would probably lead to the conclusion that it was the intention of the legislature in so doing to except from the operation of that section contracts relating to the compensation of deputy sheriffs. The public policy of the state of Virginia, as shown by its legislation and the interpretation thereof by its highest courts carried down into the jurisprudence of this state, as has been shown, undoubtedly warrants and commands, on the part of this court in the construction of that statute, a relaxation, in respect to contracts between a sheriff and his deputy, of the strictness of the English rule as enforced by the courts of Kentucky and North Carolina. Even in Kentucky, when the English rule was enforced to the very letter, as has been shown, in more than one case and carried perhaps even beyond any English precedent, public sentiment blotted it out about the same time it was abrogated in Virginia, as will be seen from an examination of the case of *Baldwin v. Bridges*, 2 J. J. Marsh. 7, where it is said: "This opinion of the impolicy and injustice of invalidating the bonds of deputies for indemnifying their principals, is fortified by public sentiment. An act of 1820 (2 Dig. 1146) declares that such bonds shall be obligatory, even when executed in consideration of sale

to the deputy." Our statute no longer provides, as did the statute of 5 and 6 Edward VI, and the early Virginia statute, both of which have been supplanted by it and are not now law in this state, that every bond, covenant, agreement and assurance for any vote or appointment to office shall be utterly void, and this provision undoubtedly had great weight in the construction put upon those statutes by the courts. They further provided that persons guilty of making such contracts should be forever disabled from holding such posts or ²¹² deputation. That, also, has been eliminated from our statute, which says only that they "shall be thereby disabled from holding said office," which language has been construed by this court in *Dryden v. Swinburne*, 20 W. Va. 89, to mean that they shall be disabled only from holding the particular term of the office in respect to which the illegal contract was made.

Where an officer has the right, under the law, to appoint a deputy, and is at liberty to contract with his deputy, in respect to compensation, as a sheriff may do in this state, the reason for the distinction between the effect of a contract by which the deputy is to have all the fees and perquisites of the office and pay his principal a sum certain out of the fees, and a contract by which he is to pay a sum certain, without limiting it to payment out of the fees, is not in all respects satisfactory, although that distinction is hoary with age and too well settled to be disturbed. With us, in the selection of deputy sheriffs, the law is so lax as not to require the application of the principle *detur digniori*. The sheriff has full latitude to select, not the most meritorious and competent man to perform the duties of deputy sheriff, but the man who will perform that duty for the least money, subject only to the limitation that the county court must consent to the appointment. He may permit his deputy to take all the fees and commissions for his services and, in consideration thereof, pay to his principal any amount of money they may see fit to agree upon, provided only that it be specified that the money so to be payable shall be paid out of the fees and commissions. If the only object of the law is to prevent trafficking and dealing between the sheriff and his deputy in respect to his compensation, whereby the deputy may take his appointment for such meagre compensation as to make it necessary for him to oppress the people and extort from them what he is not legally entitled to, it clearly falls far short of accomplishing that purpose. It is difficult to conceive of any circumstances under which a man would engage to perform the services of a

deputy sheriff and take upon himself great financial responsibility and risk, in consideration of the fees and commissions, and, at the same time, agree, in consideration of the premises, to pay his principal more money than he could reasonably expect to realize out of the fees and commissions. The law, as settled, and as applied for centuries, stands upon an assumption of facts which it is difficult to imagine ever existed in any case. With ²¹³ all due respect to the learned and illustrious men who laid its foundations, it must be said that the distinction seems to be more technical and fictitious than real. Taking the contract between the parties in this case as a whole, holding it up by its four corners, it imports nothing more than an agreement between the sheriff and his deputy, whereby the latter undertakes to perform all the services of the sheriff in a certain district except the collection of a certain tax ticket, for all the fees and commissions arising from the work, except one hundred dollars, which he agrees to pay to the former. Had they said the deputy should have all the fees and commissions less the sum of one hundred dollars, the contract would be good under the authority of all the cases cited. However, as has been said, the law is too well established to be overthrown, however devoid of sound reason it may appear to be. From this it results that no recovery can be had upon the bond or otherwise for the money which the deputy agreed to pay his principal.

But it does not follow that the plaintiff is precluded from recovering the taxes, fines and other moneys which went into the hands of the deputy by virtue of his office, as was held in Kentucky and North Carolina, unless that part of the contract which is forbidden by the laws is such that it cannot be severed from the other. It is argued here that the illegal contract between White and Cook, which the statute says disabled both of them from holding the office, disabled Cook from doing any official act as deputy. If so, then by the same means White was also disabled from doing any official act. But it is an admitted fact that both of them continued to perform the functions of sheriff and deputy sheriff, respectively, in their county. The state, county and district revenues, executions on judgments and decrees, fines and other dues, public and private, went into their hands. Is it possible that because the contract between them, in reference to the appointment of Cook, was such as is prohibited by the law and resulted in the forfeiture of their offices, the state, county, districts and private individuals must lose the large sums of money which went into their hands?

Whether legal or illegal, they held the offices. If not officers *de jure*, they were officers *de facto*: Code, c. 7, sec. 15. These funds that went into their hands were put there by the law and not solely by their illegal contract. If it be possible to ascertain what those funds amount to, why should they not be ²¹⁴ separated from the illegal consideration of the appointment and a recovery thereon allowed? What difficulty stands in the way of such severance? How much of the state money, county money, district money, what fines, what collections on executions, are in the hands of Cook are easily ascertainable, and they bear no relation whatever to the illegal one hundred dollars which Cook agreed to pay, except that, by reason of the agreement, Cook was enabled to obtain the position by virtue of which these funds came into his hands. It is claimed, for that reason alone, the bond of indemnity is vitiated, and Cook must be allowed to escape with all the money which went into his hands except what he has seen fit to pay over. The same law which permits the appointment of a deputy sheriff, and allows the sheriff to contract with him for his compensation, requires the sheriff to give a bond for the faithful performance of his duties. To allow a deputy sheriff to squander or appropriate to his own use the public funds for which the sheriff is responsible, and thereby inflict great loss upon the sureties of the sheriff himself, and possibly upon the public, simply because the contract between the sheriff and his deputy, in respect to his appointment, which is clearly severable from the public duty, faithfulness in respect to which is secured by the deputy's bond, certainly was never intended by the legislature, nor is there any evidence that the law pronounces such disastrous results except the three or four cases which have been mentioned.

The principle of severance where part of a contract is illegal and can be separated from the balance is perhaps as "rock-ribbed and ancient" as any other principal of the law.

In *Pigot's Case*, 11 Coke, 26 b—, it is said: "If some of the covenants in an indenture, or of the conditions indorsed on a bond, are against law, and some lawful, the covenants or conditions which are against law are void *ab initio*, and the others remain good." It is there said that this was unanimously agreed in 14 Henry VIII, 25, 26, etc. *Gaskel v. King*, 11 East 164, was decided almost one hundred years ago, and it is there held that "a distinct covenant in a lease, whereby the tenant bound himself to pay the property tax, and all other taxes imposed on the premises, or on the landlord in respect thereof,

though void and illegal by the statutes of 46 George III, chapter 65, section 115, will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, etc., generally; for such general words will be ²¹⁵ understood of such taxes as the tenant might lawfully engage to defray." *M'Allen v. Churchill*, 11 Moore, 483, was an action of assumpsit on a contract, whereby the plaintiff agreed to purchase the defendant's interest in a lease and pay for the fixtures on certain terms, and it appeared on the face of the agreement that it contained a clause whereby the defendant agreed that he would not, directly or indirectly, take, occupy, or carry on the business of a publican or victualer within five years from the time of making the agreement. This clause was admittedly illegal and against public policy, being in restraint of trade, but Best, L. C. J., dismissed the objection by saying: "But are we to say that every agreement is wholly bad, because it may happen to contain an illegal clause?" *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422, was an action of assumpsit to recover the balance for the sale of a store and its contents. But it appeared from the plaintiff's testimony that he sold the store for a certain amount, and in consideration of the defendant's promise to procure the removal of a postoffice to the plaintiff's place of business, and that he should be appointed postmaster. There was judgment for the defendant in the lower court. The question principally discussed in the appellate court was whether the procurement of the postoffice should be severed from the rest of the consideration, the court holding that if that were possible the plaintiff should be permitted to recover. In determining whether the illegal part of the contract should be separated from the balance of it, Gibson, C. J., said: "The value of the goods could be ascertained from the bills, but the value of the lease could not be reduced to certainty by any process, and even if it could, no one could say how much the want of the postoffice, to say nothing of the direct income of it, might take from the defendant's business. Had a price been put on the illegal part of the consideration, it might have been deducted, and the contract apportioned; as it was in *Frazier v. Thompson*, 2 Watts & S. 235, in which the consideration was goods purchased at several times, including spurious bills; and in *Yundt v. Roberts*, 5 Watts & S. 139, in which it was goods sold and a prohibited tavern bill." In *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131, it is held that "if part of agreement is contrary to statute, this does not avoid or annul other parts of the

agreement which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares ²¹⁶ the whole bad." Page v. Monks, 5 Gray, 495, holds that "a contract is not necessarily void, or wholly inoperative, because it consists in part of promises and engagements for the breach or disregarding of which the statute neither affords nor allows any action at law. In such cases, whether any of those promises or engagements can be enforced must depend upon the manner and extent of their connection and combination with the rest. If the contract is in its nature entire, and its parts are incapable of separation or division, then, though some of its stipulations are not if others of them are affected by the statute, no action can be brought or maintained upon it. But it is otherwise if the parts are severable." While there are many cases which hold that where a contract grows immediately out of, and is connected with, a prior illegal contract, the illegality of such contract will enter into the new contract and render it illegal, and that if the connection between the original illegal contract and the new contract can be traced, it cannot form the basis of a recovery: 15 Am. & Eng. Ency. of Law, 2d ed., 992. But it must be remembered that the funds which went into the hands of Cook, as deputy sheriff, although their reception by him followed the illegal contract as one of its consequences or results, were public funds. He was a de facto public officer, and it was by virtue of the law, as well as in consequence of the illegal contract, that these funds came into his hands. Moreover, while technically and directly they are due to White, they are still, in some sense, public funds, and to allow the illegal contract, in reference to his appointment, to vitiate the security for these funds would, under some circumstances, as has been shown, result in the loss of public funds. So far as these funds are concerned, the contract between White and Cook may be regarded as a contract between private individuals, but it is nevertheless a contract relating to public funds, and in so far as it may affect them, it is severable from the balance of the contract, and to the end that the public interest may be protected, it is necessary that it be held good as to such funds. In all the cases hereinbefore referred to in which the principle of separating the good from the bad in contracts has been discussed, the matters involved and affected were purely private in their nature. Here, the subject matter of the contract of indemnity, which is said to be vitiated by the illegal part of the contract, is a large amount of money which does not belong to

either of ²¹⁷ the contracting parties in point of fact, but consists of public revenues and money of individuals in the custody of the law. This is a most important distinction, and one which imperatively demands, as well as justifies, the separation of the good from the evil in the contract and permits a recovery of the money. While public policy forbids the sale of an office in whole or in part, it requires the protection and faithful application of the public revenues, and no statute should be so construed as to permit or effect the loss of public funds or the funds of innocent persons in the hands of public officers, whether they be officers *de jure* or officers *de facto*. On this point, therefore, the conclusion is, that so far as the contract and bond relate to the private interests and rights of the sheriff and his deputy, they are illegal and void, and the courts cannot enforce them as to either of the parties; but in so far as the bond relates to the moneys, public and private, which went into the hands of Cook, and which it was his duty as an officer to collect, and which were lost by his unfaithfulness or negligence, if there be any such funds, the bond is valid, and recovery thereon may be had against Cook and his sureties. But such recovery will not include any commissions or fees, for they fall within, and belong to, the private interests in the office which are the subject matter of the illegal contract. As to these matters the law will leave the parties in the situation in which they have put themselves, refusing aid to either of them. The principles announced in the following cases seem to fully sustain this view: *Faikey v. Reymons*, 4 Burr. 2069; *Farmer v. Russell*, 1 Bos & P. 296; *Brooks v. Martin*, 2 Wall. 70; *Planters' Bank v. Union Bank*, 16 Wall. 483; *McBlair v. Gibbes*, 17 How. 232; *Bly v. Second Nat. Bank*, 79 Pa. St. 453.

Another objection to the bill is, that there is no equity in it and this objection is undoubtedly well taken. The court properly dismissed the bill but gave an insufficient reason for so doing. This bill is substantially like the one in the case of *Lafever v. Billmyer*, 5 W. Va. 33. *Lafever* was the sheriff of Berkeley county, and *Billmyer* was his deputy for the years 1859 and 1860, and the bill showed that there had been no settlement between the sheriff and his deputy, and alleged that the accounts between them were complicated and intricate as this bill does. It also prayed for discovery, as is the case here, and the court held that the accounts were not mutual, and that equity had ²¹⁸ no jurisdiction unless proper ground for discovery appeared in the allegations of the bill. Judge Moore

discussed that case at great length, and came to the conclusion that there was no ground for discovery. The only thing in this bill that seems to suggest the necessity of discovery is the allegation that White, in his lifetime, delivered to Cook sundry orders, amounting, in the aggregate, to the sum of one thousand and fifty-eight dollars and twenty-five cents, which White himself had paid, and that the plaintiff does not know the amounts, numbers or character of the orders, but that Cook does know all about them, and when and under what circumstances they were delivered to him, and that he is the only person that does know. These orders seem to have been given to Cook for the purpose of making the annual settlements between White and the county court and board of education, for the bill alleges that they were used in the settlements, and that it is impossible to ascertain which orders, so filed and used, are those paid and turned over by White to Cook. This is merely colorable, and no real ground for discovery, for the reason that, if these orders are credited to White in his settlement as alleged in the bill, White had received credit for them and has no right to charge them to Cook. It is not pretended that there is any difficulty about ascertaining what taxes, fines, and executions went into the hands of Cook, and mere allegations of such difficulty, without facts to support them, such as that records had been burned or destroyed or lost, would be utterly insufficient. The tax-books on file in the sheriff's, county clerk's and auditor's offices show the taxes for the district of Rock, undoubtedly. All these taxes for certain years went into the hands of Cook for collection, except what were retained for collection by White, and there seems to be no dispute about what portion of the taxes White retained for collection. The license taxes, fines and executions are all matters of record. Therefore, as to these matters, no discovery is necessary. After ascertaining what Cook is chargeable with, which is easy of accomplishment, so far as shown by this bill, it devolves upon Cook to show that he has accounted for it according to law, by payment to White in money or orders, either actually delivered to him or paid by Cook and credited to White in his settlements, or paid to the state, execution creditors, or other persons legally entitled to receive it. He is entitled to credit for all proper disbursements made by him. Such are undoubtedly ²¹⁹ the views held by Judge Moore in the *Lafever v. Billmyer* case, for he says: "In all those matters of execution and administration, the records would enable the plaintiff to

designate, with absolute certainty, the parties and their claims." In matters of account, as to legal demands, a court of equity rarely, if ever, has concurrent jurisdiction unless discovery is necessary, except where the accounts are mutual: *Lafever v. Billmyer*, 5 W. Va. 33; *Yates v. Stewart*, 39 W. Va. 124, 19 S. E. 423; *Thompson v. Whittaker Iron Co.*, 41 W. Va. 580, 23 S. E. 795. If accounts between sheriffs and their deputies can be drawn into a court of equity upon such allegations as are contained in this bill, other matters of a similar nature would follow, and but a short time would be required to utterly break down and obliterate the line of demarcation between law and equity jurisdiction where matters of account are involved.

Another objection to the bill is, that no order has been made by the county court or board of education requiring Cook to pay over the balance due, respectively, to the county court and the board of education. This position is untenable. While these funds in the hands of Cook are public in their nature and primarily belong to the county and district funds, and possibly other funds, Cook is but the agent or representative of White, and the funds must reach their ultimate destination and application and settlement through White, the principal, or his personal representative, he being dead. Any order that may be made in respect to them would be directed to White and not to Cook. Prior to the making of such order, White's personal representative has the right and power to compel Cook to pay over these funds, to the end that they may be in hand and ready when the order is made. *State v. Hayes*, 30 W. Va. 107, 3 S. E. 177, *Board of Education v. Parsons*, 22 W. Va. 314, 580, and *Board of Education v. Cain*, 28 W. Va. 758, have no application here, for they were all suits against the sheriff himself, and not actions by the sheriff against his deputy. An action by White's administrator against Cook and his sureties upon the bond is not a proceeding by the state, county court or board of education, but is a proceeding by the sheriff against his agent for money which, according to the allegations of the bill, is due and payable.

It appearing that there is no equity in the bill, and that the plaintiff has brought his suit in the wrong court, the decree of 220 the court below, sustaining the demurrer and dismissing the bill, is affirmed.

A Public Office cannot be the subject of a contract: Water Commrs. v. Cramer, 61 N. J. L. 270, 68 Am. St. Rep. 705, 29 Atl. 671; monographic note to State v. Hocker, 63 Am. St. Rep. 185, 186. A partnership cannot exist in a public office, because it is against public policy; but there may be a deputyship with the service of the deputy to be compensated by a share of the emoluments of the office: Rowan v. Chenoweth, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544.

The Acts for Which Sureties on an Official Bond are Liable are considered in the monographic note to Feller v. Gates, 91 Am. St. Rep. 497-579.

STATE v. GILLILAND.

[51 W. Va. 278, 41 S. E. 131.]

INTOXICATING LIQUORS—Statutory Crime.—The simple selling of intoxicating liquors is purely a statutory offense, and not a common-law crime. (p. 794.)

CRIMINAL LAW—Common-law Jurisdiction to Require Bond for Good Behavior.—Courts of record had discretionary jurisdiction at common law, upon conviction of a misdemeanor, to bind the accused, as part of the judgment, to good behavior for a time. Such jurisdiction was not statutory. (p. 794.)

CRIMINAL LAW—Jurisdiction to Require Bond for Good Behavior of the accused does not exist when the conviction is for a statutory misdemeanor, or a common-law misdemeanor, the punishment for which is prescribed by statute. (p. 797.)

Gilmer & Gilmer, for the plaintiff in error.

R. H. Freer, attorney general, for the state.

278 **POFFENBARGER, J.** At the November term, 1899, of the circuit court of Greenbrier county, W. M. Gilliland, upon the trial of an indictment, charging him with having unlawfully sold, offered and exposed for sale, at retail, spirituous liquors, wine, porter, ale, beer and drinks of a like nature, without a state license therefor, was convicted, and the court, in addition to imposing a fine of fifteen **279** dollars and costs, further ordered "that said Gilliland be required to give bond with good security in the penalty of five hundred dollars conditioned to be of good behavior toward all the citizens of this state, and not to sell intoxicating drinks contrary to law for the period of twelve months"; and the defendant was committed to the custody of the sheriff until the bond should be given. The court having overruled his motion to set aside so much of the judgment as required this bond, he excepted and has brought the case here on a writ of error and supersedeas.

The indictment charges a statutory offense. The simple selling of intoxicating drinks is not a common-law crime or offense: Bishop on Statutory Crimes, sec. 984. "An ale-house, if not disorderly, is under the common law lawful, no license being required to keep it": 1 Bishop on Criminal Law, sec. 505, citing *Rex v. Ivyes*, 2 Show. 468. This indictment is under section 1 of chapter 32 of the Code, and the punishment for the offense is prescribed by section 3 of said chapter, and is a fine of not less than ten nor more than one hundred dollars, and, at the discretion of the court, imprisonment in the county jail not exceeding three months. As the selling of intoxicating liquors was not an offense at common law, there is no common-law punishment for it. The only punishment, therefore, must be that prescribed by the statute. But if there had been common-law punishment for the selling of liquors, it would be repealed by the statutory provision in reference thereto. "We can always separate the offense from the punishment. So that, for example, a statute which provides a new punishment for an old offense repeals by implication only so much of the prior law as concerns the punishment; leaving it permissible to indict an offender either under the old law, whether statutory or common, and inflict on him upon conviction the punishment ordained by the new, or under the new statute, at the election of the prosecuting power": Bishop on Statutory Crimes, sec. 166. In addition to this, we have a statute which prohibits the infliction of any other than statutory punishment, when it exists. "A common-law offense for which punishment is prescribed by statute shall be punished only in the mode so prescribed": Code, c. 152, sec. 3. Hence, if the selling charged in the indictment were a common-law offense, it could be punished only under section 3 of chapter 32 of the Code.

²⁸⁰ However, this is not conclusive of the question, unless it appear that the requisition of sureties is punishment. There was a discretionary jurisdiction at common law in the court trying a person charged with misdemeanor to bind the accused, after conviction and as a part of the judgment, to good behavior for a time, and that jurisdiction was not statutory. It was a jurisdiction inherent in every court of record having criminal jurisdiction. In addition to this, there were statutes under which persons not convicted of any offense might be required to enter into recognizances to keep the peace and be of good

behavior. They were the same in principle and in substance as the provisions found in chapters 148 and 153 of the Code. "If a person have been convicted of a misdeameanor, it is usually part of the judgment that he shall find security for his good behavior for some time": 9 Bacon's Abridgment, 308. "This requisition of sureties has been several times mentioned before as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors; but there, also, it must be understood rather as a caution against the repetition of the offense than any immediate pain or punishment": 4 Blackstone's Commentaries, c. 18. "Binding to the good behavior was a discretionary judgment at the common law, given by a court of record, for an offense at the suit of the king, after a common-law conviction by a verdict of twelve men": 4 Burn's Justice of the Peace, 268. "I shall observe in general that for crimes of an infamous nature, such as petit larceny, perjury, or forgery at common law, gross cheats, conspiracy not requiring a villainous judgment, keeping a bawdy-house, bribing witnesses to stifle their evidence, and offenses of the like nature against the first principles of natural justice and common honesty, it seems to be in great measure left to the prudence of the court to inflict such corporal punishment and also such fine and lien to the good behavior for a certain time, etc., as shall seem most proper and adequate to the offense, from the consideration of the baseness, enormity and dangerous tendency of it; the malice, deliberation, and willfulness, or the inconsideration, suddenness and surprise with which it was committed; the age, quality, and degree of the offender; and all other circumstances which may any way aggravate or extenuate the guilt": 2 Hawkins' Pleas of the Crown, 631. It is said by Blackstone's Commentaries, book 4, 252, that this jurisdiction falls under the title of preventive justice, and he there discriminates ²⁸¹ between preventive justice and punishing justice. But this certainly does not mean that a judgment requiring such recognizance is not punishment. All punishment belongs in some sense to the same title. "And, indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter, all punishments inflicted by temporal powers may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter

others by his example; all of which conduce to one and the same end—of preventing future crimes, whether that be effected by amendment, disability, or example.” He then proceeds to a discussion of the statutory provisions by which surety for the peace or good behavior is taken when no offense has been committed, and says in those cases such requisition is not meant as any degree of punishment. From this as well as from his saying the requisition of sureties upon conviction for the misdemeanor is a part of the penalty inflicted, it is to be inferred that in such case the order or judgment requiring the convicted person to enter into bond for good behavior is punishment. The quotations from Hawkins, Bacon and Burns all indicate that it was regarded by the authors of those works as punishment. It would be difficult to class it as anything other than punishment. When the bond is required and not given, the consequence is imprisonment. It is required under pain of imprisonment. How could it be anything else than punishment? Here, the judgment was that the defendant enter into a recognizance for his good behavior for one year, and, in default of his doing so, he was committed to the custody of the sheriff. How long he was to remain in custody was in the discretion of the court, and it might have been for the whole year. The statute only permits an imprisonment of three months. Hence, the punishment attempted to be inflicted was more severe than the statute itself prescribes.

The existence, nature and extent of his jurisdiction is discussed at great length by Judge Green in *State v. Gould*, 26 W. Va. 258, and the conclusion of the court as announced by him is, that the court, in rendering judgment against a defendant in any case upon the conviction of him of any misdemeanor, has no right to add to its judgment as a part thereof **282** an order requiring the defendant to give a bond with approved security to keep the peace, or be of good behavior, and in default thereof to be imprisoned till such bond is given. In that opinion, however, it is admitted that the jurisdiction existed at common law in respect to conviction of common-law misdemeanors. But it is pointed out that the taking of such recognizance had never been the practice in this state or in Virginia, and it is argued that as the evidence adduced in the trial of an indictment for misdemeanor is not such as it required in a proceeding for the purpose of requiring sureties for the peace or good behavior, there is no evidence upon which the court can base a judgment requiring such surety. From a careful exam-

ination of the authorities cited and others it seems that notwithstanding the want of evidence of threats or bad character on the part of the accused, the English courts did exercise such jurisdiction and require such recognizances. While the Virginia and West Virginia reports do not disclose any case in which the jurisdiction is recognized, that fact does not preclude its existence. And as it has been shown that it did exist at common law, and the common law obtains in this state so far as it has not been repealed and is not repugnant to the laws of this state, it cannot be blotted out by mere argument. But it cannot be exercised as to purely statutory offenses, nor in cases of common-law offenses for which punishment is prescribed by statute. Hence, it can only exist as to common-law gross misdemeanors for which common-law punishment only can be inflicted. As to these cases, the jurisdiction does exist, and, to that extent, the principles announced in Gould's case must be overruled. For the reasons herein given, the view taken by the court in *Estes v. State*, 2 Humph. (Tenn.) 496, cannot be adopted.

The conclusion, therefore, is that there is error in the judgment and it must be reversed.

SECURITY NOT TO COMMIT A MISDEMEANOR.

I. Security After Trial.

II. Security Against Breach of Peace.

I. Security After Trial.

In all cases of gross misdemeanors a court of record has, from the common law, authority to be exercised or not as a sound discretion may dictate, to require upon conviction and as part of the punishment and sentence, that the defendant give bonds or security to keep the peace and be of good behavior: 1 Bishop's Criminal Law, 7th ed., sec. 945; *Dun v. Regina*, 12 Q. B. 1026. The common-law jurisdiction thus conferred upon courts of record does not, however, seem to have been exercised to any appreciable extent in the United States. In *Estes v. State*, 2 Humph. 496, the rule was applied and the doctrine announced that in cases of conviction, in courts of record, for gross misdemeanors, the court may, in its discretion require sureties of the defendant for his good behavior, but a single act of gaming, unaccompanied with circumstances of aggravation, is not such a misdemeanor as will authorize a court to require such sureties. In this case the court said: "We have no doubt but that at common law a court of record has a discretion to require sureties for good behavior from a party, who shall have been found guilty of a gross misdemeanor, and that there is no change of the law in this respect in this state. If, as Blackstone

says, it is an honor to the English law, 'on grounds of reason, humanity, and public policy,' that such a power should exist in England, surely there is no ground why these humane and conservative principles should not exist in our law. In this respect, therefore, the common law is the law of this state. But this power, though discretionary, must be exercised with a sound legal discretion by the circuit court. The misdemeanor must, according to Blackstone, be of a gross character where this judgment is given. It does not follow that because a party has been guilty of a misdemeanor that he may be required to find sureties for good behavior. The character of offense of which he may be guilty must contain in itself that turpitude that would justify the appellation, 'gross' to the offense, or the evidence must disclose circumstances connected with it, aggravating it to that character. Thus, the offense of keeping a bawdy-house is, in its nature, a gross misdemeanor; so also of a gaming-house or disorderly house, but the selling of a single half-pint of whisky, unaccompanied with any other fact, although against law and a misdemeanor, is not a gross misdemeanor. But if it were to appear in evidence that the party selling was surrounded with drunken, noisy, obscene men, to the great annoyance of the public, this state of things produced by his practice, and in part by the very whisky he might be convicted of selling, would constitute such violation of law a gross misdemeanor. So a libel might or might not be a gross offense, according to the circumstances of the publication, and its character might mitigate or aggravate it. So a game of cards might be played against law, but under circumstances that would not justify, in this legal view of the subject, the denomination of a gross misdemeanor, but if it be played in connection with common gamblers, associated at a gaming-house, or, as is sometimes the case, by the roadside on Sunday with negroes, it would be a gross misdemeanor": *Estes v. State*, 2 Humph. 496. This seems to be the only case in the United States where such common-law jurisdiction is discussed until the case of *State v. Gould*, 26 W. Va. 258, where the jurisdiction is recognized, and it was held that the court independently of statute, in rendering a judgment upon a verdict or guilty of misdemeanor, has no right to add to its judgment, as a part thereof, an order requiring the defendant to give a bond with approved security to keep the peace or of good behavior, and in default thereof to be imprisoned until such bond is given. This case is overruled by the principal case, to the extent that in cases of conviction of a gross common-law misdemeanor, punishment for which is not prescribed by statute, the court may require sureties of the defendant for his good behavior, and that such jurisdiction does not exist when the conviction is for a statutory misdemeanor, or a common-law misdemeanor for which a statutory punishment is prescribed. Thus limited, the common-law rule can be of little effect or use, as in most states statutes define what acts do or do not constitute misdemeanors, and at the same time

prescribe the penalty therefor. This is true of the act complained of in the principal case, and in *State v. Gould*, 26 W. Va. 258. In *People v. Brown*, 23 Wend. 47, it was held that in a proceeding under the statute, relative to disorderly persons, the magistrate before whom the conviction takes place has no authority, in addition to an infliction of the punishment prescribed by statute, to require the defendant to enter into a recognizance for his good behavior. In Kansas a statute exists (Crim. Code, sec. 242), providing that "the court before which any person shall be convicted of any criminal offense shall have power, in addition to the sentence prescribed or authorized by law, to require such person to give security to keep the peace or be of good behavior, or both, for a term not exceeding two years, or to stand committed until such security be given. This statute has been declared constitutional and enforced in quite a number of convictions of misdemeanors: *State v. Chandler*, 31 Kan. 201, 1 Pac. 787; *Webb v. State (Kan.)*, 53 Pac. 276; *State v. Woodard*, 7 Kan. App. 421, 53 Pac. 278; affirmed in *State v. Pamenter*, 60 Kan. 857, 56 Pac. 1132. In *Bamber v. Commonwealth*, 10 Pa. St. 339, it appeared that defendant was indicted for burglary, and upon his trial therefor was acquitted; the court held that thereafter it was, in a proper case, within the discretion and jurisdiction of the court to require the defendant to find sureties to insure his keeping the peace and being of good behavior, and to commit him until compliance with an order requiring such sureties.

II. Security Against Breach of Peace.

"Preventive justice, upon every principle of reason, of humanity, and of sound policy, is preferable to punitive justice, the execution of which is always attended with harsh circumstances. Preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offense shall not happen, by finding pledges or securities for keeping the peace or for their good behavior." Such was the rule at common law: *Browne's Blackstone's Commentaries*, bk. 4, c. 28, p. 668. And as a restraint on the commission of crime in the nature of a breach of the peace or other misdemeanor, courts in this country generally have power to bind a person in a penal bond to the state, conditioned that such person will keep the peace of the state as to all of its citizens, and especially as to the one at whom the threatened breach of the peace appears to have been pointed. The order requiring such surety is made either upon affidavit or proof of the necessity therefor to protect an individual or the community. This can be done, although the person required to give the bond has not been indicted, tried or convicted of any offense. It constitutes a part of the preventive power of the court in the administration of the criminal law, and authority therefor is almost universally conferred by statute in each of the states constituting the United

States: *Howard v. State*, 121 Ala. 21, 25 South. 1000; *Ex parte Harfourd*, 16 Fla. 283; *State v. Sayer*, 35 Ind. 379; *Arnold v. State*, 92 Ind. 187; *Ritchey v. Davis*, 11 Iowa, 124; *In re Mitchell*, 39 Kan. 762, 19 Pac. 1; *Adams v. Ashby*, 2 Bibb, 96; *State v. Sargent*, 74 Minn. 242, 76 N. W. 1129; *State v. Emnitz*, 27 Mo. 521; *Ann Doyle's Case*, 19 Abb. Pr. 269; *Sands v. Benedict*, 2 Hun, 479; *State v. Lyon*, 93 N. C. 575; *State v. Tooley*, 1 Head, 9; *Lawton v. State*, 5 Tex. 272; *State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688; *Weisselman v. State*, 95 Wis. 274, 70 N. W. 169. The object and provisions of these statutes are very similar in each of the states, and in *Howard v. State*, 121 Ala. 22, 25 South. 1000, are stated to be as follows: "Section 5162 of the code authorizes the institution of proceedings before magistrates to keep the peace. The purpose of the statute is to prevent the commission of an offense against the person or property of another, and to this end a warrant may issue for the arrest of the person who has threatened, or is about to commit, an offense on the person, or property of another, and if there is just reason to fear the commission of such offense, the defendant must be required to give security to keep the peace. It is a preventive measure which the magistrate is authorized to set in motion to restrain the defendant from the commission of an offense against the person or property of another and not a proceeding to try a person charged with the commission of a criminal offense. To threaten an offense on the person or property of another is not an offense against the law for which a person may be punished. At most, as we have said, he may be restrained from so doing by proper proceedings, but not punished by fine or imprisonment. True, should the defendant fail to give the security required by the magistrate, it is the duty of the magistrate to commit him to jail until he enters into the undertaking with sufficient sureties for the time he is required to keep the peace, not more, than twelve nor less than six months. But this commitment to jail is predicated upon his failure or refusal to give the security required by the order of the magistrate, and not as the punishment for the commission of an offense": *Howard v. State*, 121 Ala. 23, 25 South. 1000.

In *State v. Lyon*, 93 N. C. 576, the court said that "a peace warrant is denominated in the code a 'criminal action,' but it is no part of its purpose to charge a party with a criminal offense, try him for the same, and if found guilty, impose a punishment upon him. It is a proceeding in the administration, of preventive justice, the purpose of which is to oblige a person, who there is probable ground to believe will commit some criminal offense, or do some unlawful act, to stipulate with and give satisfactory assurance to the public that such apprehended offense will not happen; that he will keep the peace and be of good behavior generally, and in such cases, specially toward a person or persons named. The per-

son recognized is only required to do what a good citizen ought to do without compulsion. . . . The nature of the purpose to be subserved suggests and requires that the action of the officer requiring such security of a party must be conclusive, and not subject to the right of appeal ordinarily. An appeal, in the absence of any statutory regulation to the contrary, would vacate the order requiring security to keep the peace, and the persons from whom danger is apprehended might, without such restraint, commit the offense pending the appeal." Hence, Justice Dick said, in *State v. Locust*, 63 N. C. 574, that "such proceedings must be summary and conclusive to render them effectual for the protection of the complainant, and to secure the public peace, and generally there is no appeal from the action of the justice of the peace in the matter": *State v. Lyon*, 93 N. C. 577. "It is immaterial by what technical name this proceeding is designated. It is not a criminal trial in the sense that a justice of the peace is without jurisdiction to hear the complaint, issue a warrant, hear the charge against defendant, and require him to enter into a recognizance if the charge is proven, and, if the defendant neglects or refuses to comply with such order, then commit him to the county jail during the period for which he was required to give security, or until he so recognizes, stating in the warrant the cause of commitment with the sum and time for which security was required. In this class of cases there can be no trial by jury, no final adjudication for a past offense, but simply an order that defendant will enter into a proper recognizance that he will not commit the offense charged in the complaint, or, in case of default in so doing, then that he stand committed to the county jail": *State v. Sargent*, 74 Minn. 245, 76 N. W. 1129. The individual occupying the relation of protector for those under disability can lawfully demand sureties of the peace for such persons under disability, and make the necessary oath for that purpose, as the husband for the wife, the parent or guardian for infants of tender years or persons non compos mentis, the master for the slave, and in all other cases where the individual whose life, person or property is in danger is disqualified by law from taking the oath necessary to obtain the warrant, or from being prosecutor in the case: *State v. Tooley*, 1 Head, 9.

A prosecution under the statute for surety to keep the peace is a criminal proceeding to prevent the commission of a crime, but it is not a prosecution for crime: *Fisher v. Hamilton*, 49 Ind. 341; *State v. Cooper*, 90 Ind. 575; *Adams v. Ashby*, 2 Bibb. 96; *Weisselman v. State*, 95 Wis. 274, 70 N. W. 824. A proceeding for sureties of the peace is not a prosecution for a crime; the doctrine of reasonable doubt does not apply to it, nor are the jury the judges of the law, but they must take the law from the judge: *Arnold v. State*, 92 Ind. 187.

A constitutional provision which protects one from a second jeopardy for the same offense does not apply to a prosecution for surety to keep the peace: *State v. Vankirk*, 27 Ind. 121. The proceeding may be brought in the name of the state without any relator: *State v. Carey*, 66 Ind. 72. A threat to do great bodily injury, coupled with a condition which includes the performance of a duty by the party threatened, if made in a manner which would lead a cautious man to believe that it would be executed, is sufficient cause for requiring the party making the same to keep the peace: *Ritchey v. Davis*, 11 Iowa, 124. On an application to a magistrate for sureties of the peace, there must be a formal complaint in writing and upon oath, besides the examination required by the statute, to justify the issuance of a warrant: *Bradstreet v. Furgeson*, 23 Wend. 638. The affidavit in such proceedings must state, as required by the statute, that it is made only to secure the protection of the law and not from anger or malice, and the only issue for trial is whether complainant had just cause for the fears stated when the affidavit was filed, and if that question be found affirmatively, surety must be required, though such cause may have ceased: *Stone v. State*, 97 Ind. 345. The question of just cause for fear relates to the time of the institution of the proceedings, and not to the time of the trial, and if on the final hearing it is found that the fears have, since the commencement of the proceeding, ceased to exist, this fact may be considered by the court in determining the time and amount of the recognizance to be entered into by the defendant, but it does not entitle him to an unconditional discharge at the costs of the relator: *State v. Sayer*, 35 Ind. 379; *State v. Steward*, 48 Ind. 146.

BARRETT v. COAL COMPANY.

[51 W. Va. 416, 41 S. E. 220.]

CONTRACTS TO DO WORK to Satisfaction of Another—Right of Rejection.—If a person contracts to manufacture articles or do work "to the satisfaction" of another, such other is the sole judge of the quality of the work done, and his right to accept or reject it is absolute, conclusive, and binding upon the parties, without investigation of his reasons, unless he acts fraudulently. (p. 804.)

CONTRACTS—Quantum Meruit.—There can be no recovery on a special count based on a contract for work that is not fully executed, but a recovery for the actual value of the work done may be had upon a quantum meruit under the common counts, when failure to complete the work is without the fault of the plaintiff. (p. 806.)

J. M. Broun, W. L. Ashby and J. M. Ball, for the appellant.

Brown, Jackson & Knight, A. P. Farley and J. Hatcher, for the appellee.

⁴¹⁶ BRANNON, J. Leon Barrett, in an action of assumpsit in the circuit court of Raleigh county against the Raleigh Coal and Coke Company, recovered a verdict and judgment for four hundred dollars, and the company has brought the case to this court. Barrett and the company made a written contract, by which Barrett undertook to manufacture for the company five hundred thousand brick in a thorough and workmanlike manner, of certain description, ready for the builder's use, "and to the satisfaction of the general superintendent of said company or his authorized representative." Barrett, claiming that the company had ⁴¹⁷ accepted sixty thousand brick and then refused to accept any more brick or to allow him to proceed in the execution of the contract, brought the action against the company to recover damages for breach of the contract.

The first error assigned is that the court overruled a demurrer to the declaration, consisting of the common counts and a count based on the contract. It is claimed that the special count is bad, because it says and counts on both an oral and written contract. If so, it does not state any difference in legal effect between the oral and the written contract. Judging from the count, we would say that there was an oral contract afterward reduced to writing. I see no substantial objection to this. Besides, duplicity is no objection nowadays.

The general superintendent stopped the work and refused to accept any more brick. Upon the trial the defendant offered and was refused a number of instructions. One of these instructions is to the effect that if the jury believed from the evidence that the brick manufactured by the plaintiff and offered for inspection under his contract were in good faith rejected by the general superintendent of the company, or his authorized representatives, as not being to his or their satisfaction, the action of said superintendent or his representatives is binding upon both parties to the contract, and the plaintiff is not entitled to any credit against the company for the brick so rejected. The defendant also asked another instruction, that under the contract the general superintendent or his authorized agents were made sole judges of the quality of the brick manu-

factured under the contract, and that the action of the superintendent or his representatives in accepting or rejecting said brick was conclusive and binding upon both parties, unless the superintendent or his representatives acted fraudulently. The cases of *Kidwell v. Baltimore etc. R. R. Co.*, 11 Gratt. 676, and *Baltimore etc. R. R. Co. v. Polly, Woods & Co.*, 14 Gratt. 447, hold that where a contract for a construction of work provides that estimates of an engineer of the work shall be conclusive upon the parties, the contract is valid and the estimate of the engineer is conclusive in the absence of fraud or mistake. The contract in the present case does not in terms say that the action of the superintendent shall be conclusive, but the decisions just cited are upon the same line, and bear on the present case. Indeed, I do not perceive that under the law the present contract has any ⁴¹⁸ less force than if it expressly provided that the action of the superintendent in rejecting the brick should be conclusive. The decisions upon just such a contract as this are very numerous. In *Osborne & Co. v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591, it is held that where a party bought a binder upon condition that if it did not work to his satisfaction, he might return it, his right to reject was absolute, and his reasons for rejection could not be investigated. In *Benjamin on Sales*, Bennett's edition, 607, we find the law stated upon many authorities that "it is clear that a condition that the article to be made shall be satisfactory to the buyer, is a valid condition, and if it is not so, and the article is not accepted, the vendor has no remedy. It is immaterial whether the article does or does not conform to the order; the other is not bound to accept, or to be satisfied." Why is this the law? Because so the bond is writ. Though it takes the pound of flesh, so the bond is writ. It is the contract. The party has proposed to make his own will conclusive, and the other party has accepted that as the contract, and court cannot set itself up, nor can a jury, as a judge to say whether the party who is given this power of action by the contract has acted reasonably or unreasonably. In *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. 736, it is held in such case that defendant's "objections may have been ill-founded, or unreasonable in the opinion of others, yet if they were made in good faith he had the right to reject the machine." In *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463, the plaintiff agreed to make a satisfactory suit of clothes, and the defendant returned the suit as unsatisfactory. It was held that

an action for the price could not be maintained. The plaintiff offered to amend the suit, but the defendant refused. The court said that if the plaintiff chose to contract that the suit should be satisfactory to the defendant, he could recover only for the contract as it was made, and even if the articles were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory, and that it was not for anyone else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. 2 Parsons on Contracts, eighth edition, page 62, note 1, will state the same doctrine. It was plainly error to reject the defendant's instructions 1 and 2. It was not error to reject defendant's 419 instruction 5, that "vague statements of estimated profits are not entitled to weight as evidence when the witness cannot or will not give the facts and figures upon which such estimates are based." If that evidence was admitted as competent by the court, the court could not pass upon its weight as proposed by this instruction. It was error to reject instruction No. 6 that "damages must be proven and cannot be presumed."

Instruction No. 7 told the jury that the defendant was not bound by the contract to make any further advances to the plaintiff at the time the second kiln of brick was complete and offered to the defendant. The contract provided for estimates from time to time, and payment of not over seventy per cent of the amount due thereby, and did not provide for any advances, and the plaintiff admitted as a witness that at that time there was not anything due him unpaid. This instruction should have been given—No. 7.

No. 8 should have been given, telling the jury that if the plaintiff requested an advance of money for the payment of his employes, and that he was not, at the time of such request, entitled to such advance, and that he quit work on account of such refusal and refused to make any more brick, they must find for the defendant. If the brick already received had not been fully paid for, that instruction would have been objectionable, as the plaintiff might, under circumstances, be entitled to recover, under the common counts, as below stated, for what brick he had furnished; but he admitted that he had been fully paid. It was a question for the jury whether the plaintiff had so quit work, as supposed in the instruction. I do not

think that instructions 9 and 11 were proper. They go to the effect that if the plaintiff and the superintendent jointly selected the clay for making brick, the responsibility for the choice could not be cast on the defendant alone; and that if the clay on the Hull farm was unfit for brick, the fault was with the plaintiff in using without objection the clay for the same, if he held himself out as a fair brickmaker, and did not reject the clay offered by the defendant as unfit. The contract positively provides that Barrett should burn the brick at a point to be designated by the company on the Hull farm. The choice was with the company. The contract placed no duty as to that on Barrett. If the clay was bad, it was not Barrett's ⁴²⁰ fault, and he is not answerable for any damage resulting from that cause. It is said that the court erred in admitting the contract in evidence because of variance between the declaration and the contract. As the company had the power of rejection, it would be required to pay for what brick it accepted, not under the special count, but under one of the common counts; for though the work was not completed, the plaintiff could recover upon a quantum meruit for those brick which the company had accepted, as otherwise he would get no pay therefor. This would be the case if he had not been paid therefor fully, or if there was not a willful dereliction of duty by the plaintiff without the assent and against the will of the defendant, as by the abandonment of the contract because of an unwarranted demand for advance pay. Though a man contract to build a house for another for a certain price, and does part of the work, and is prevented from doing the balance by the fault of the other party, or from cause beyond his power, he may recover its worth to the party for what he has done, if it has any value, under the common counts: 2 Robinson's Practice, 412; 3 Minor's Institutes, 330; Leopold v. Salkey, 31 Am. Rep. 100; 2 Parsons on Contracts, 523. Thus the common counts would justify the admission of the contract in evidence. While speaking of this point I will say that as the case has to go back, it becomes unnecessary to speak of the alleged error, though I do not see it as such, in allowing an amendment and refusing a continuance. And as to the variance, that can be corrected. We do not think there is any error shown by bill of exceptions No. 3, in allowing plaintiff to give evidence that a sum had been offered him to compromise his claim. Beyond question, an offer of mere compromise is not admissible. But I do not think we can rank this as an offer of compromise.

We do not think that there was an error in allowing Barrett's evidence shown in bill of exceptions No. 4. He had had some experience in brick-making, and that entitled him to be heard as to his estimate of the cost of making brick. Its weight was a matter for the jury.

We think the court erred in permitting the evidence shown in bill of exceptions No. 5 to go to the jury, to prove the fact that the company were to put up a large number of coke ovens and that the work had been stopped. What had that to do with this case? These brick were not to be used therein. Was it to ⁴²¹ prejudice the minds of the jury against the defendant? This is a fit occasion to apply what is said in *Sesler v. Coal Co.*, 41 W. Va. 318, 41 S. E. 216, decided this term, as to the impropriety of admitting in a case evidence of things foreign to the case. The same remark applies as to the testimony of R. J. Frazier as to litigation between him and the company for breach of a contract between him and it. It has nothing to do with this case, so far as I can see.

I do not think the evidence of Robinson and Lemon admissible as to the quality of the clay for brick-making. They did not show themselves to be experts in that art. A brickmaker does not necessarily know what clay is proper for brick. He may know a good brick when made; but that does not show that he knows anything about the clay.

Judgment reversed and new trial granted.

When a Contract is made to perform work for or render services to another to his satisfaction, the word "satisfaction" refers to his mental condition, and he can reject the work performed or the article produced if not satisfactory to him: See *Sax v. Detroit etc. Ry. Co.*, 125 Mich. 252, 84 Am. St. Rep. 572, 84 N. W. 314; *Pennington v. Howland*, 21 R. I. 65, 79 Am. St. Rep. 774, 41 Atl. 891; *Porman v. Walsh*, 97 Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881; *Adams Radiator etc. Works v. Schnader*, 155 Pa. St. 394, 35 Am. St. Rep. 893, 26 Atl. 745. He cannot, however, evade his liability under the contract by arbitrarily and unreasonably insisting that he is not satisfied: *Doll v. Noble*, 116 N. Y. 230, 15 Am. St. Rep. 398, 22 N. E. 406; *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312.

BARKER v. OHIO RIVER RAILROAD COMPANY.

[51 W. Va. 423, 41 S. E. 148.]

RAILROADS—Depots—Negligence.—A passenger entering upon a railroad platform or depot is not bound to keep a lookout for defects and pitfalls, but has a right to assume that the depot is in safe repair, and, without knowledge of a defect therein, is only required to use ordinary care, such as is required of a person in case such depot is in safe repair. (p. 809.)

RAILROADS—Depots—Contributory Negligence.—If a passenger while trying to get her children onto the platform of a railroad depot unconsciously steps back in a hole in the platform, caused by the negligence of the company, and of which she had no previous warning, she is not guilty of contributory negligence, though if she had been walking forward toward the hole she could easily have seen it. (pp. 809, 811.)

RAILROADS—Depots—Contributory Negligence.—A mother who goes to a depot to take a train with her helpless children is not required to neglect proper attention to them and keep an active lookout for dangerous defects in the depot and pitfalls in her way caused by the negligence of the railroad company. She has the right to assume that there are none, and act on such assumption until in some manner warned of their existence. (p. 811.)

RAILROADS Must Keep Their Depots and approaches thereto in safe condition for passengers, otherwise they are negligent. (p. 811.)

RAILROADS—Gross Negligence—Contributory Negligence.—A railroad company is not excused from gross negligence though the act of the person injured contributed thereto, unless there was some act of negligence on the part of the latter that an ordinarily prudent person would not have been guilty of under the circumstances. pp. 812, 813.)

EXPERT MEDICAL Evidence that the diseased condition of a certain person is due to a shock to the spinal column is admissible. (p. 816.)

GROSS NEGLIGENCE of a Railroad Company Warrants Punitive Damages, whenever there is such want of care as raises the presumption of a conscious indifference on the part of the company to the safety of its passengers. (p. 818.)

W. R. Gunn, C. E. Hogg, and Sommerville & Sommerville, for the appellant.

H. P. Camden and R. Wiley, for the appellee.

424 DENT, P. The Ohio Railroad Company complains of a judgment of the circuit court of Mason county rendered against it on the twenty-first day of May, 1900, for the sum of six thousand five hundred dollars in favor of Myrtle L. Barker, plaintiff.

The facts necessary to a determination of this controversy are as follows: On the second day of July, 1898, the plaintiff, in the daytime, went to the depot at Clifton of the defendant for the purpose of taking a south-bound train. She had with her two children, one a nursing babe in a baby carriage, the other, four years old, was following behind her. She stepped upon the rear platform of the depot and she and her sister lifted the ⁴²⁵ baby carriage up. She called her other child with the intention of lifting him upon the platform, took a step backward and fell into a hole twelve inches wide and extending clear across the platform in front of the entrance door, it being occasioned by a plank becoming loose and having been washed out by the March flood. The station agent's attention had been especially called to it, but no pretense had been made to repair it. The company's negligence under the circumstances was as gross as it possibly could be, and the only possible avenue of escape is the customary dernier resort of alleged contributory negligence, and yet numerous errors are assigned for the consideration of the court. They are classified under the following four classes by defendant's attorneys: 1. Does the declaration aver, and does the evidence prove, that the defendant was a common carrier of passengers, so as to charge it with the high duty imposed by the common law upon common carriers of passengers? 2. Was the plaintiff guilty of contributory negligence? 3. Did the court err in refusing to enter judgment for defendant on the special findings of the jury? 4. Did the court err in refusing to grant a new trial? It is useless to dwell on the first. The objection is that the declaration does not allege in express terms that the defendant is a common carrier. It does allege that it is a railroad corporation, operating a railroad from the city of Wheeling to the town of Kenova. All railroads in this state are common carriers: Const., art. 11, sec. 9; Laurel Fork etc. R. R. Co. v. West Virginia Transp. etc. Co., 25 W. Va. 324.

On the question of contributory negligence the facts are undisputed, and it depends entirely on the degree of care required of passengers entering upon a railroad platform or depot. Are they in duty bound to keep a lookout for pitfalls or death traps, or have they a right to assume that the depot is in safe repair, and without knowledge of a defect are they only required to use such ordinary care as is required of a person in case such depot is in safe repair? If the defect is apparent and they carelessly walk into it, they are guilty of contributory negli-

gence, on the theory that he who is aware of another's negligence must avoid it if possible. The plaintiff had the right to assume that the platform was reasonably safe for travel, and she was not in duty bound to keep a lookout for defects. The portion on which she ⁴²⁶ had momentarily entered was safe, and nothing had suggested to her that any portion was unsafe. She was busily engaged in getting her children onto the platform when she stepped backward into the hole. Had she looked, she could have seen it, yet she did not know it, and there was nothing other than the fact it was there to call her attention to it. In *Elliott on Roads and Streets*, section 638, it is said that "where the plaintiff, assuming that a sidewalk was safe and knowing nothing to the contrary, permitted her attention to be momentarily attracted to some children playing in the street and fell into a hole in the sidewalk from which the cover had been removed, she was held not guilty of contributory negligence." In the case of *Barry v. Terkildson*, 72 Cal. 256, 1 Am. St. Rep. 55, 13 Pac. 658, the court says: "The fact that her attention was momentarily attracted in another direction—a thing of the most common occurrence to travelers along a street—falls far short of that contributory negligence which in law defeats an action of damages." In the case of *Jennings v. Van Schniek*, 108 N. Y. 531, 2 Am. St. Rep. 459, 15 N. E. 424, the court says, in speaking of a plaintiff who fell in a coal hole in the sidewalk: "She had the right to assume the safety of the sidewalk, and so was not called upon to give attention to her steps, until in some manner warned of danger." In the case of *Brush Electric Lighting Co. v. Kelley*, 126 Ind. 221, 25 N. E. 812, the court, in approving the quotation above from *Elliott on Roads and Streets*, says: "She had the right to presume that the sidewalk was free from obstructions until her attention was in some way called thereto, and to act upon such presumption." And further on: "We can imagine many circumstances whereby the attention of the pedestrian might be attracted from the sidewalk, which would be sufficient to divert the attention of any reasonable person": *Noblesville Gas etc. Co. v. Locher*, 124 Ind. 79, 24 N. E. 579. Plaintiff had the right to assume that the platform was in a safe condition, and act on such assumption until her attention was in some way called to the defect, and her attention to her children was such as any reasonable person might be expected to give. In fact, there was no imprudence on her part. If, before she stepped backward, she had looked, she would have seen the hole, but she was resting under

the justifiable assumption that no such hole existed, and therefore there was nothing calling upon her to look backward. She had the right to assume that the company had discharged its duty, and that she could give the necessary ⁴²⁷ attention to her children without danger of injury from its culpable negligence. In short, she acted as any other prudent person would have done under the same circumstances and with the same knowledge: Fetter on Carriers of Passengers, 130. Because she innocently confided in the company's faithful discharge of its duties toward its passengers, she cannot be held guilty of contributory negligence. Trust and confidence is not contributory negligence, although it may be unworthily bestowed. She will not be so confiding hereafter. Her knowledge and experience has increased, but her confidence is shattered and her health destroyed. It is impossible to say that she acted different under the circumstances from what any other person of ordinary caution and prudence would have acted. Of course, there are persons naturally highly cautious, and others who have had large experience with the manner in which railroad stations and depots are usually managed, and who are continually on the alert for such defects. Such persons cannot be classed with the ordinarily prudent. The law requires an engineer to keep a lookout for helpless trespassers on the track, qualified by consistency with the proper discharge of his other duties. So any lookout for open defects the law may require of passengers must be qualified not only by consistency with the discharge of other duties to other persons, but also with the just assumption of duty discharged on the part of the company. A mother who goes to a depot to take a train with her helpless children cannot be required to neglect proper attention to such children and keep an active lookout for dangerous pitfalls in her way by the negligence of the company, for she has the right to assume there are none until she is in some manner warned of their existence. Her first warning and knowledge of the company's negligence came to her when she fell backward therein, and was too late for her to avoid it. If greater prudence is required of passengers than was exercised by her on this occasion, railroad companies should be required to put up a general warning to the traveling public not to go to their depots except at personal risk, and thus avoid being guilty of contributory negligence in case of accident. A little care and a few nails at the proper time and place would save an immense amount of trouble. "The plaintiff, as a passenger of the appellant, was entitled to demand

that the station's approaches and accessories used by it should be kept in a safe ⁴²⁸ condition": Louisville etc. Ry. Co. v. Lucas, 119 Ind. 589, 21 N. E. 968. "Though the conduct of the passenger has contributed to the injury sustained, yet if such conduct has not been in a legal sense imprudent or negligent, he may recover, provided the carrier is in fault": 5 Am. & Eng. Ency. of Law, 2d ed., 645. "To exonerate defendant from liability for its negligence which also caused plaintiff's injury, it is not sufficient that plaintiff by his act contributed thereto, but it must further appear that in doing that act he was at fault and guilty of what the law calls negligence": New York etc. R. R. Co. v. Ball, 53 N. J. L. 289, 21 Atl. 1052. The only alleged act of negligence that defendant can find in plaintiff's conduct was that she was not on the lookout for and did not discover defendant's negligence in time to avoid it. This is not legal negligence, for she had the right to confide in plaintiff to some extent. Contributory confidence is not contributory negligence. A person guilty of negligence should not be permitted to escape the results thereof by setting up misplaced confidence as contributory negligence. Facts sufficient to establish contributory negligence not appearing determines the various other questions presented in favor of the plaintiff. Defendant insists that the court erred in giving the following instruction: "The court instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, went to the defendant's depot in the town of Clifton, on the second day of July, 1898, with the intention and for the purpose of becoming a passenger on one of the defendant's passenger trains, and if they further believe from the evidence that the said Myrtle L. Barker, after reaching the platform of the said depot, and while on the said platform, still intending so to become a passenger, not being at the time guilty of contributory negligence on her part, fell into a hole in the said platform, whereby she was injured, as in her declaration is alleged; and if they further believe from the evidence that the hole in the said platform was there in consequence of the negligence of the defendant, then the jury should find for the plaintiff, and assess her damages at such an amount as the jury under all the evidence in the case believe her entitled to recover, not exceeding, however, the sum of ten thousand dollars." The objection to this instruction is that it leaves out the question of contributory negligence. A bare reading of the instruction shows this contention is unfounded.

Defendant also objects to the following instruction: 429
“The jury are further instructed that if they believe from the evidence that there was a hole in the platform of the defendant’s depot into which the plaintiff fell and was injured, and that she was there, at the time of her injury, intending to become a passenger on one of the defendant’s passenger trains, and that the hole was there by reason of the defendant’s negligence, then the court further instructs the jury that before the defendant can avoid the consequences of such negligence on its part, it has the burden of proof upon it to show the contributory negligence of the plaintiff, and that such contributory negligence was the proximate, and not the remote, cause of the plaintiff’s injury. And the court here instructs the jury that contributory negligence is the absence of that degree of care which an ordinarily prudent person of similar intelligence and of the same class, would exercise under like circumstances.” This instruction is not open to serious objection in this case. While it puts the burden of proof on the defendant to prove contributory negligence, yet it does not deny the right of defendant to show such negligence by the plaintiff’s evidence, but is only to the effect that contributory negligence cannot be sustained except by a preponderance of the evidence. “Similar intelligence” used in this instruction means ordinary intelligence, and “the same class” is a distinction between passengers and employés, trespassers and licensees. Employés are charged with a much higher degree of care to avoid accidents than passengers, and such an accident as this to an employé would be completely covered over with the flexible and expanding blanket of fellow-servancy. The defendant was not injured by this instruction.

Defendant objects to the following instruction: “The court further instructs the jury that the defendant, as a carrier of passengers, owes to those approaching or leaving its trains the duty of keeping its stations and platforms thereof in a reasonably safe condition for convenient use, and thereof the court instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, went to the defendant’s depot in the town of Clifton, on the second day of July, 1898, with the intention and for the purpose of becoming a passenger on one of defendant’s passenger trains, she had the right, upon reaching the platform of the said depot, to assume, in the absence of information to the contrary, that such platform was then in a reasonably safe condition for her convenient use as such intended 430 passenger; and relying upon this assumption, she

could neglect precautions that are ordinarily imposed upon persons, under such circumstances, not holding the relation to each other of that of passenger and carrier." This is simply no more than saying that the defendant owed her a higher degree of care than if she were not a passenger, and that therefore she was not required to take the same precautions as a trespasser, licensee or employé. Because defendant succeeded in getting instructions in terms stronger than it was entitled to does not justify the reversal of the judgment, although such instructions apparently conflict with defendant's instructions. Defendant in its management of this case, by instructions and otherwise, was endeavoring to show that it was the duty of the plaintiff not to confide in its discharge of duty, but to keep a lookout for its negligence so as to avoid the same. If the plaintiff acted prudently, that was all she was required to do. There is no act of imprudence charged to her except that the defendant would make the fact that she did not keep a lookout for its negligence an act of imprudence. This may be true in fact, but it is not in law.

The defendant objects to the following instruction: "The court instructs the jury that to become a passenger and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare, but he is a passenger as soon as he comes within the control of the carrier at the station, through any of the usual approaches, with the intent to become a passenger. And the court therefore further instructs the jury that if they believe from the evidence that the plaintiff, Myrtle L. Barker, on the second day of July, 1898, went to the defendant's depot at the town of Clifton, by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within a reasonable time before the time for the departure of said train, whether or not she had purchased a ticket from the defendant or its agent." It states the law correctly, as the plaintiff was entitled to the rights and protection of a passenger even before she purchased her ticket: 5 Am. & Eng. Ency. of Law, 2d ed., 489.

431 Defendant insists the court should have given the following instruction: "The court instructs the jury that a person who uses a platform of a railroad station which his observation,

exercised with an ordinary degree of care, would have informed him was dangerous, takes the risk of injury from such open and apparent defects therein that such ordinary observation would have detected. Therefore, if the jury believe from the evidence that the defect in the platform complained of as the cause of the injury in this case was, at the time of the alleged injury, open and apparent to ordinary observation, and if they further believe from the evidence that such observation, exercised with an ordinary degree of care, would have informed the plaintiff that the platform was dangerous, and if the jury further believe from the evidence that the plaintiff, under these circumstances, attempted to use the platform, then the court instructs the jury that she took upon herself the risk of all injuries resulting to her from such open and apparent defect, and that she cannot recover for injuries resulting therefrom." This instruction destroys the right of a passenger to assume that the company has done its duty, and requires him to keep a lookout for the company's negligence. If a passenger knows of or is in any manner put on his guard against, the company's negligence, he is bound to avoid it, but he is not bound to be in continual fear thereof or keep up a ceaseless observation to detect the same.

Defendant insists that the following instructions should have been given: "The court instructs the jury that there is no situation which will excuse a person from exercising that ordinary degree of care that would be exercised by an ordinarily prudent person under the same circumstances, and the court therefore instructs the jury that the plaintiff cannot excuse herself for failure to exercise such ordinary degree of care by showing that her attention was diverted from her own footsteps by solicitude for her child."

This instruction wrongfully assumes that plaintiff did not exercise an ordinary degree of care under the circumstances, and tried to excuse herself therefrom by showing that solicitude for her children diverted her attention. This is a false assumption. Her children, however, were a part of the circumstances, and in determining the degree of care she must use under the circumstances, they must be taken into consideration. ⁴³² For a person with the care of children on her hands is not as free to devote her attention to her own safety as she would otherwise be. She owed the duty of protection to them as well as to herself. If they had been injured, the company would have been very anxious to impute her negligence to them.

Defendant also insists the following instruction should have been given: "The court instructs the jury that if they believe from the evidence that there was a hole in the platform of defendant's depot, and that the plaintiff, in approaching and getting on the platform, could, by exercising ordinary care, have seen the said hole, and could by so seeing it have avoided the injuries complained of, then her failure to exercise such ordinary care to discover such hole is contributory negligence, and the jury must find for the defendant." This casts on the plaintiff the duty of keeping a lookout for the defendant's negligence, instead of having the right of assuming its faithful discharge of its duties. Defendant excepts to the evidence that the plaintiff had children living. This evidence is not objectionable, although it may be immaterial and irrelevant. It is shown she had two children with her at the time of the accident. The additional evidence only showed they were still living. Defendant asked no instruction in relation thereto, and its objection appears to be purely technical: *Moore v. Huntington*, 31 W. Va. 842, 8 S. E. 512; *Johns v. Charlotte etc. R. R. Co.*, 39 S. C. 162, 39 Am. St. Rep. 709, 17 S. E. 698; *Alberti v. New York etc. R. R. Co.*, 43 Hun, 421.

Defendant excepts to the physician's evidence, because he is permitted to give his opinion that the plaintiff's condition might have been caused by a shock, a fall or anything that produces a shock to the spinal column. By other evidence this condition was connected with the accident. It is expert evidence and not objectionable: 12 Am. & Eng. Ency. of Law, 2d ed., 447; *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217; *Turner v. City of Newburgh*, 109 N. Y. 301, 4 Am. St. Rep. 453, 16 N. E. 344; *Keene v. Village of Waterford*, 130 N. Y. 188, 29 N. E. 130.

Defendant excepts because of evidence admitted showing what a competent nurse would have cost, she having been nursed by her mother and sister. The evidence was it would cost from five dollars to six dollars per week. She was in bed three months. A nurse at this rate would have cost less than one hundred dollars, being beneath the jurisdiction of the court, 433 and could only affect the verdict to this extent, if at all. Some authorities hold that such evidence is incompetent if the services were gratuitously given to her: *Goodhart v. Pennsylvania R. R. Co.*, 177 Pa. St. 1, 55 Am. St. Rep. 705, 35 Atl. 191. In that case it is said: "Such services involve no liability on the part of the plaintiff, and therefore afford no basis for a

claim against the defendant, as for expenses incurred." The services referred to were those of wife and children to husband and father. In such a case no legal responsibility could accrue. For neither could a wife charge a husband for such services, nor a child in the absence of a contract its father. Their services are provided for in the other damages allowed for the injury. A different rule prevails where the services are rendered by one who has the legal right to charge for them. For such a one donates them to the injured party and not to the injurer: *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Klein v. Thompson*, 19 Ohio St. 569. In the latter case it was held that although the plaintiff was under no legal obligations to pay for services gratuitously rendered or paid for by others out of charity, yet he was entitled to be placed in a position to pay for such services voluntarily if in good conscience he should see proper to do so.

The plaintiff in this case is a widowed woman, compelled to rely on her own efforts for support. She was nursed and taken care of by her mother and sister, who were under no legal obligation to do so, and who have the right to charge her for such services if she is able to pay them or return them in kind. It is not shown in the evidence whether such services were rendered gratuitously or not. Certainly they were not rendered gratuitously to the defendant, but in so far as defendant is concerned, they may reasonably have expected to be compensated. At least the plaintiff should be put in a condition to compensate them. This is a matter of love and affection between themselves, and is not a matter of contributory negligence that should diminish the amount of damages occasioned by the defendant's negligence. They have the right to say to her, "If you recover for our services from the defendant we will expect you to pay us; otherwise, we give them to you freely, through love and affection, and expect only a return in kind." In view of what has been said, it is unnecessary to copy herein and comment on the special findings of the jury. They amount to this: that if the plaintiff had been in position to do so, and ⁴³⁴ been looking toward the hole she could have seen it, but that the necessary attention to her children prevented her from looking in the direction of the hole. All the rest of the platform was in good order, so that the portion that plaintiff did see and occupy led her to believe that the residue thereof was in a like condition, and when she raised her baby buggy upon the platform with her back to the hole there was nothing to indicate to her within the

range of her then vision that the platform behind her was not in like condition as the portion on which she was then standing; and assuming it was under the circumstances, it was not negligence in her to step backward without looking, as not knowing, she could not foresee that the company would permit such a dangerous trap in the platform. It might well be held that the company, in permitting this dangerous trap in their platform for three months, was guilty of such wanton and willful recklessness and disregard of the limbs and lives of its passengers as to make it liable for criminal negligence and for punitive or vindictive damages. Gross negligence warrants punitive damages whenever there is such want of care as raises the presumption of a conscious indifference on the part of the company to the safety of its passengers: 5 Am. & Eng. Ency. of Law, 2d ed., 711. To leave a dangerous trap such as shown in this case in front of a depot door undoubtedly shows on the part of the company a conscious indifference to the safety of those invited to take passage on its trains: Alabama etc. R. R. Co. v. Arnold, 80 Ala. 600, 2 South. 337; Railroad Co. v. Arms, 91 U. S. 489. This question, however, is not raised in this case.

There is no error that will justify the setting aside the verdict and granting a new trial. Already two trials have been had resulting in substantially the same verdict. Under the law as propounded, a new trial might be more disastrous to the defendant. Sometimes Providence takes care of railroad companies as well as infants.

The judgment is affirmed.

A Carrier of Passengers owes them the duty of keeping its station platforms in a reasonably safe condition, and is liable to persons, who themselves are duly careful, for damages sustained by reason of its negligence in not observing these duties. A passenger has a right to assume that he can safely pass across a depot platform: Fullerton v. Fordyce, 121 Mo. 1, 42 Am. St. Rep. 516, 25 S. W. 587; Johns v. Charlotte etc. R. R. Co., 39 S. C. 162, 39 Am. St. Rep. 709, 17 S. E. 698.

PICKENS v. COAL RIVER BOOM AND TIMBER CO.

[51 W. Va. 445, 41 S. E. 400.]

WATERCOURSES—Construction of Boom Statute.—A statute relating to booms and dams, and providing that nothing therein shall be construed as depriving mill owners and other riparian proprietors from recovering damages from a corporation maintaining a boom or dam, creates no new right in mill owners, but only places the existing constitutional and common-law rights of such owners beyond judicial construction to the contrary. (p. 821.)

WATERCOURSES—Right to Erect and Maintain Log Booms. If a logging boom in a navigable or floatable stream is not negligently, unlawfully, or improperly erected or managed, there is no liability for any damage caused thereby to others using the stream for milling or other purposes. (p. 821.)

DAMAGES—Pleading.—Unless the act complained of is alleged to have been done improperly, negligently, unlawfully, or wrongfully, it will not support an action for damages. (p. 822.)

WATERCOURSES—Right to Use for Logging Purposes.—A navigable or floatable stream may be used both for milling and log purposes, in a reasonable manner, although such uses may mutually interfere with and injure each other. The erection of a boom in a proper manner to catch and hold logs is a lawful use of the stream, and does not render its owner liable to a mill or other riparian owner thereon for unavoidable damage caused by the use of the stream for such logging purposes. (p. 822.)

WATERCOURSES—Erection of Logging Boom—Nuisance—Damages.—The erection of a logging boom in a navigable or floatable stream in such close proximity to a mill thereon as to impede the flow of the water and cause a deposit of sand and sediment immediately below the mill dam, thereby destroying, in an appreciable degree, the water power of such dam, creates a nuisance, and renders the boom owner liable to the mill owner for the damages caused thereby. (p. 823.)

WATERCOURSES—Logging Boom—Nuisance.—Measure of Damages for the interruption of the natural flow of a navigable stream by the erection of a logging boom, constituting a nuisance, and preventing the running of a mill, is what the mill would have been worth during such deprivation of its use, if such deprivation had not taken place, and this is the rental or profitable value of the mill. (p. 825.)

NUISANCE, MOVABLE—Damages.—Permanent damages cannot be recovered for the maintenance of a removable nuisance, but actual damages may be recovered for its maintenance up to the time of judgment, and exemplary damages for its maintenance thereafter. (p. 825.)

NUISANCE.—Statute of Limitations does not run against a continuing nuisance, except as against its maintenance five years prior to the institution of the suit. (p. 826.)

NUISANCE.—Lessors who Create a nuisance are liable equally with their lessee with notice for its maintenance and continuance. (p. 826.)

Brown, Jackson & Knight and Payne & Payne, for the plaintiff in error.

Chilton, MacCorkle & Chilton and Mollohan, McClintic & Matthews, for the defendant in error.

440 DENT, P. Roman Pickens obtained a judgment in the circuit court of Kanawha county on the twenty-fourth day of April, 1900, against the Coal River Boom and Timber Company for the sum of twelve thousand one hundred and ninety dollars. The defendant being dissatisfied therewith assigns numerous reasons why the same is erroneous.

The first is the overruling of the demurrer to the declaration and each count thereof. The first and third counts charge the defendant with the erection of a boom in Coal river below the plaintiff's mill, thereby obstructing the water in such manner as to cause a deposit of sand in the bed of the stream below and **447** materially injuring the water-power of the mill. In neither count is it charged that the boom was unlawfully or wrongfully constructed or the water-power unlawfully or wrongfully obstructed. For failure in this respect both counts are bad. They should either charge the act complained of was unlawful or wrongful. There can be no legal damage unless the act complained of is unlawful or wrongful. A wrong imports unlawfulness, and there can be no wrong unless a legal right is invaded. "That which is right and lawful for one man to do cannot furnish the foundation for an action in favor of another": Cooley on Torts, 93; Porter v. Mack, 50 W. Va. 581, 40 S. E. 459; Lawler v. Baring Boom Co., 56 Me. 443. "Where the act or omission complained of is not prima facie actionable, it should be stated that the act was done wrongfully": 21 Ency. of Pl. & Pr. 917; Glen Jean etc. Ry. Co. v. Kanawha Ry. Co., 47 W. Va. 728, 35 S. E. 978; Guilford v. Kendall, 42 Ala. 651; McKenzie v. Ohio River R. R. Co., 27 W. Va. 306. The allegations in the declaration may be true and yet the defendant be guilty of no wrongful act, for he may have lawful authority to do that which he is charged with and not have violated the defendant's legal rights. Hence it is necessary to allege the act complained of was wrongfully, unlawfully or negligently done, or some language of like import should be used, so that the defendant may be put to the plea of not guilty. Plaintiff's counsel attempt to justify this omission because the statute relating to booms (App. Code, p. 1071, sec. 28), provides: "That nothing in this act shall

be so construed as to deprive the owners of mill property and other proprietors on the said river and branches thereof from recovering damages for injury to their property by the said corporation, their agents or employés." This, instead of justifying the omission, authorizes the use of the words wrongful or unlawful. The object of this reservation is to preserve the constitutional and common-law rights of mill owners, and to set at rest any claim that might be made that authority given to a boom company to erect its boom took away from mill owners the right to demand damages if their mill property was unlawfully injured thereby. The act relieves the boom from being a public nuisance, yet it makes wrongful injuries to private property caused by its construction still unlawful. It may be a private nuisance. This provision, which amounts to nothing more than the reservation of common law and constitutional ⁴⁴⁸ rights, was made necessary from the fact that certain authorities place the granting of public franchises upon the same platform with the public agents of the government and hold that when they have not exceeded the power conferred on them and when they are not chargeable with want of due care, no claim can be maintained for any damage resulting from their acts: Sedgwick on Damages, 110, 111. This holding has been repudiated by a great weight of authority, but our legislature desired to place the matter beyond the power of judicial construction to the contrary. This provision sets at rest any claim of exemption from any unlawful damages to private property a boom company may attempt to assert by virtue of its charter and the public nature of its employment. It is placed on the same basis as a private citizen so far as the rights of other private citizens are concerned. The act says to the boom company, "you may have the public franchise and the right to erect a boom, but you must pay to every private citizen whose property is unlawfully injured by you such damages as may be occasioned thereby." If the boom company accepts, it acquires the right of floatage, the right to erect a boom, and the right to use the stream in a reasonable manner so long as it does no unlawful damage to the property rights of another. If it does such unlawful damage, its charter furnishes no protection against the same. This is the proper conclusion that was reached in *Rogers v. Coal River Boom etc. Co.*, 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008, and is the same conclusion that was arrived at on the former hearing of this case. It is equivalent to saying that "an act done under lawful authority, if done in

a proper manner, can never subject the party to an action whatever consequences may follow": *Radcliffe v. Mayor*, 4 N. Y. 200, 53 Am. Dec. 337. For these reasons the demurrer to the first and third counts should have been sustained from the fact that they fail to allege that the act complained of was done improperly, negligently, unlawfully or wrongfully. Admitting, however, this to be true, is the court justified in reversing the judgment by reason thereof? Not if the second count be good and all the plaintiff's evidence was admissible thereunder: *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910.

The second count charges the construction and maintenance of the boom in such negligent, unskillful and unlawful manner that the plaintiff's natural fall and milling property were damaged ⁴⁴⁹ thereby. While the word "wrongful" is not used in this count, yet the words "negligent" and "unlawful" fully supply its place and render the count good: *Rogers v. Coal River Boom etc. Co.*, 41 W. Va. 593, 23 S. E. 919, 26 S. E. 1008. These words "negligent, unskillful and unlawful" have no reference to the state's rights as representative of the public, for these it acquired by virtue of its charter, but they refer to the plaintiff's private rights as to which it it alleged the boom was so negligently, unskillfully and unlawfully constructed and managed as to impair or destroy them in whole or in part, and resulted in the plaintiff's damage. The question naturally presents itself as to what were the legal rights of the plaintiff which the defendant unlawfully invaded. In the case of *Buchanon v. Grand River etc. R. R. Co.*, 48 Mich. 364, 12 N. W. 490, it was held: "The right to obtain water-power from a stream for milling purposes and the right to use the stream for floatage of logs modify each other, and though the exercise of each may render the other less valuable, there is no ground for complaint if it is considerate and reasonable." A navigable stream may be used for both milling and log purposes in a reasonable manner, notwithstanding such uses may mutually interfere with and injure each other: 4 Am. & Eng. Ency. of Law, 2d ed., 710-712. Such rule applies even to streams only floatable in damp weather: *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60. A "reasonable manner" means in such manner as will not destroy or impair the common law or constitutional rights of a prior mill operator. It does not mean an illegal manner. In determining where to locate and how to construct its boom, it was the duty of the defendant to so construct and locate it as not to injure plain-

tiff's dam rights or water-power, whether natural or artificial. If it did so its action was wrongful and illegal, and the construction of its boom unskillful and negligent in so far as those rights were concerned. It had no right to locate its boom in such proximity to plaintiff's waterfall or dam, or so construct it, as to render the same materially less beneficial to plaintiff. Nor had it the lawful right to locate and construct its boom any place below plaintiff's water-power, where such an effect would be produced, except by paying him the damage occasioned thereby: *Tinsman v. Belvidere Delaware R. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565; *Richards v. Peter*, 70 Mich. 286, 38 N. W. 278; *Tillotson v. Smith*, 32 N. H. 94, 64 Am. Dec. 355; *Lee v. Pembroke Iron Co.*, 57 Me. 481, 2 Am. Rep. 59; *Brown v. Bush*, 45 Pa. St. 61; *Crittenden v. Wilson*, 5 Cow. 165, 15 Am. Dec. 462; ⁴⁵⁰ *Eddy v. Simpson*, 3 Cal. 247, 58 Am. Dec. 408; *Pearson v. Rolfe*, 76 Me. 380; *Dwinel v. Veazie*, 44 Me. 94, 69 Am. Dec. 94; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91; *Alexander v. City of Milwaukee*, 16 Wis. 255; *Miller v. Shenandoah Pulp Co.*, 38 W. Va. 558, 18 S. E. 740. From these authorities it is plain that if defendant's boom is so located and constructed as to cause the deposit of sand and debris and temporarily injure plaintiff's natural fall or prior artificial dam, such location and construction are unlawful, and wrongful in so far as plaintiff's private rights are concerned, and defendant must answer to him for the damages occasioned thereby.

While the count is so framed as to cover permanent damages, yet from the nature of the wrong it is evident that the plaintiff may only recover temporary damages. The boom is not a permanent structure as compared with plaintiff's water-power. It is temporary and movable. After it ceases to be useful from the exhaustion of the timber on the waters of the stream it will be removed or abandoned, and it is liable at any time to be washed out by the force and effect of repeated floods. A permanent structure is one that is to continue for all time except for some unforeseen event, while a temporary structure is one erected for a known temporary and limited business. This boom was never intended to be permanent. Yet this suit is not for the wrongful construction of the boom, but it is for the wrongful deposit of sand resulting from the wrongful location and construction of the boom. A different kind of boom, or a boom on a different location, would not have so affected the deposit of sand. An act in itself perfectly lawful becomes un-

lawful from its effects on the rights of others: *Tinsman v. Belvidere etc. R. R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 571. The deposit of sand is a nuisance to plaintiff's property not of a permanent nature, for there is nothing more shifting than sand, especially when under the influence of moving waters. If the boom caused the deposit, its removal, reformation or destruction will entirely remove the holding back force, and the unrestrained waters will soon reduce the river bed to its natural level. The giving of permanent damages to the full extent claimed in the declaration would be equivalent to a transfer of plaintiff's water-power to the defendant. This plaintiff cannot demand, for defendant has the ⁴⁵¹ right to abate the nuisance and stop the injury, and plaintiff can only ask that until it does so it pay him damages for the continuance thereof, such damages as he suffers by loss of the temporary use of his water-power: *Guinn v. Ohio River R. R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806, 33 S. E. 87; *Rogers v. Coal River etc. Co.*, 39 W. Va. 272, 19 S. E. 401; *McKenzie v. Railroad Co.*, 27 W. Va. 306; *Hargreaves v. Kimberly*, 26 W. Va. 788, 57 Am. Rep. 121; *Smith v. Point Pleasant etc. R. Co.*, 23 W. Va. 451. This action is not for the original wrongful cause of the nuisance, but it is for the wrongful continuance thereof. It cannot be barred by the statute of limitations except as to its maintenance five years previous to the institution of the suit. A judgment in this suit will not license the continuance of the nuisance, as in case of permanent damages for a permanent structure, but rather makes it the more unlawful as becoming willful in its nature, and will subject the nuisance to exemplary damages: 3 Sedgwick on Damages, sec. 924. All that plaintiff may recover in this action is the damages suffered by reason of the loss of the use of his water-power occasioned by the wrongful continuance of the nuisance, resulting from the unlawful location and construction of defendant's boom, during the preceding five years. No permanent damages are recoverable, for no permanent damages are inflicted. Plaintiff is only deprived of the temporary use of his property. For this, if occasioned by defendant's wrongful acts, continued from day to day, he should be fully compensated. Defendant must abate the nuisance or be liable to repeated actions from time to time growing in severity until the same is abated.

This virtually disposes of the instructions, and renders it unnecessary to copy and comment on them separately here.

Instruction No. 1, given for the plaintiff, is misleading, in that it tells the jury if the nuisance caused by the defendant "reduced the height of his natural fall, he is entitled to recover such damages as he may have sustained by reason of the said natural reduction of said fall." This would lead the jury to infer that plaintiff was entitled to recover permanent damages, and without regard to the statute of limitations pleaded. As heretofore shown, all he can recover is the damages occasioned by the loss of the use of his water-power for five years previous to the bringing of his action: *Ward v. Ward*, 47 W. Va. 766, 35 S. E. 873; *McCreery v. Ohio River R. R. Co.*, 43 W. Va. 110, 27 S. E. 327. Instruction No. 2 is not erroneous, in that it endeavors to establish a mill right by prescription, ⁴⁵² but it is unnecessary in this case. Plaintiff had his mill constructed and in operation at the time the boom was erected. The defendant, without authority from plaintiff, had no lawful right to locate and construct its boom so as to materially affect or destroy plaintiff's water-power. A dam does not usually alter or change the flow of the water below it. It may interfere with floatage or a dam above it: *Lincoln v. Chadbourne*, 56 Me. 197; *Gould on Waters*, sec. 204.

Instruction No. 3 is not bad, because it advises the jury that plaintiff was entitled to the use of both his artificial dam and natural fall as against the defendant's right to erect a boom below the same. The same cause that destroyed the power of the fall also rendered the dam useless. Without the fall the dam would have been of no value. These two last being, merely general instructions to find for the plaintiff, presumptively relate to the condition of affairs at the time of the institution of the suit, and it was unnecessary to limit the time to the period free from the statute of limitations. Instruction No. 4 is misleading, and should not have been given. The true measure of plaintiff's damages is the loss he sustained by reason of his not having the use, during preceding five years prior to the bringing of this suit, of his mill free from the alleged nuisance thereto. If this loss was total, then the loss of profits or the rental of the property is the true measure of damages. If not total, then the comparative loss of rents or profits is the measure of damages. The elements of loss in case of a removable nuisance is usually measured by the rental value of the property: 3 *Sedgwick on Damages*, sec. 948, p. 64. The measure of damages for the interruption of the natural flow of a stream which prevents the running of a mill is what the mill would have been

worth during such deprivation of its use if such deprivation had not taken place. That is its rental or profitable value: *Wooden v. Wentworth*, 57 Mich. 278, 23 N. W. 813. The first section of the instruction seems to authorize the jury to take into consideration the permanent value of the mill, as though it were affected by a permanent nuisance. If such damages were allowed, it would authorize the continuance of the nuisance for all time. The second section of the instruction is in accord with the law. The third section contains the same fault as the first, as it allows permanent damages, whereas the plaintiff can only recover for the temporary nonuse of his property occasioned by defendant's ⁴⁵³ wrongful act. He cannot abandon a mill partly constructed and sue the nuisancer for the amount expended by him, but he is entitled to a fair rental for the full capacity of his water-power, subject to reduction for the use he has had thereof. He has the right to have the nuisance abated by repeated actions, and if he fails to assert this right, he cannot make the nuisancer liable in addition to the rental of the property for the costs of improvements unnecessarily abandoned by him. He should proceed with his improvements and make the nuisancer pay for the rental thereof until the nuisance is abated. This instruction was improperly given. There is no objection to the fifth instruction, for the statute of limitations does not run against a continuing nuisance except as against the maintenance of the same five years prior to the institution of the suit. Nor to the sixth, as it is a mere general instruction that the jury should find for the plaintiff, provided it is shown by a fair preponderance of the evidence that the defendant caused the injury complained of, as it is presumably limited to the time immediately preceding the bringing of the suit, although it would have been better to have limited the instruction to the period not barred by the statute of limitations.

This also disposes of the instructions asked by the defendant and refused by the court, except the tenth and twelfth, which relate to the nonliability of the defendant by reason of its having five years prior to the institution of this suit leased the boom to the Coal River Boom and Driving Company. While the boom is under lease, it is still the property of the defendant, and was located and constructed by it to be used in the manner the lessees are using it, to wit, for the purpose of catching and storing logs, and while the lessees may be equally guilty with the lessors in maintaining an unlawful nuisance as to plaintiff's property, yet the lessors still own it, authorize the use, and derive a profit

therefrom. The original erector of a nuisance, or that which creates a nuisance, cannot escape responsibility by conveying the premises away, much less by leasing them: *Plummer v. Harper*, 3 N. H. 88, 14 Am. Dec. 336, note.

The defendant took a large number of exceptions to questions and answers, none of which appear to be important or sufficient to reverse this case, had it been properly tried as to the true measure of damages, and it is useless, unnecessary work to cumber the record with them.

⁴⁵⁴ As the case must be reversed, it becomes unnecessary to consider the grounds for continuance, or the motion for a new trial founded on the insufficiency of the evidence or the discovery of new evidence.

For the error committed by the circuit court in giving the erroneous instructions asked by plaintiff the judgment is reversed, the verdict of the jury set aside, a new trial awarded, and case remanded.

Mr. Justice Brannon dissented and said in part:

"I am impressed with the consideration that the legislature, when considering this boom act, did not regard its powers as those of ordinary log rafting, known to generally do no damage to mill owners or others, but knew that the powers to build booms and piers and gather great collections of logs, and impede the natural flow would inevitably cause damage to mills and lands, and determined to make such companies answer for damages to mill owners and other proprietors arising from their operations, though unaccompanied by negligence. In *Rogers v. Coal River Boom Co.*, 41 W. Va. 598, 23 S. E. 919, 26 S. E. 1008, this section 28 is so construed.

"I am reluctant to so construe this boom act, giving powers to a corporation operating for its own gain so great as to place all mill owners and land owners at its mercy, without remedy for injury, unless misuse, negligence, can be shown. Say that the legislature, under the reserved preference for navigation, could vest a company with immunity from such liability, my position is that it has not chosen to do so; it has not chosen to outlaw all people living along a stream so useful to its citizens by using this navigation preference vested in it for their great damage. It has manifested the contrary by section 28, reserving them action for self-defense. Did it mean this? Ought it not be liberally construed for their protection? Intended to save rights, should it be frittered away by a narrow construction so as to save only what was already saved without it? The law being that when a company has a charter to carry on a work, it is not liable, unless guilty of negligence, this section was intended to make a boom company vested with powers so fraught with danger to take its grant with the duty of

repairing any loss entailed upon others from its exercise. If the boom, though properly made, though it could not be otherwise made to answer its end, does yet overflow a bottom, the company is liable.

“Does it so dam and obstruct the water as to injure the health of those along its banks, or render it unfit for stock or otherwise? If so, the company is liable. Therefore, I do not think any of the counts for want of charge of negligence bad. True, technical pleading requires an averment of wrongful action, but it does seem to me that as we take judicial notice of section 28, by the averment that defendants’ boom damaged plaintiff, a cause of action is shown. From this view it follows that the liability does not depend upon the chance or capricious ground of the boom being placed here or there, near to or remote from the mill. It may be placed anywhere without its entailing negligence from choice of location, for it carries liability wherever placed if damage ensue. I think Judge Dent’s opinion unsatisfactory in the fact that it infers negligence from the mere occurrence of damage, which, on principle, cannot be.

“What I have said above is predicated upon concession of power in the state to grant boom rights regardless of mill owners, but leaving them remediless for any damage from the necessary and proper operation of a boom. I do not discuss this matter. Many authorities say that in improving navigation a riparian owner’s rights of property cannot be impaired without compensation, others that whatever is necessary to navigation may be done without pay: *Monongahela Nav. Co. v. United States*, 148 U. S. 341, 13 Sup. Ct. Rep. 622; *Yates v. Milwaukee*, 10 Wall. 497; *Moore v. Veazie*, 32 Me. 343, 52 Am. Dec. 655. I have no idea that the state can enable any corporation to injure a riparian owner’s land outside the stream: *Rogers v. Coal River Boom Co.*, 41 W. Va. 598, 23 S. E. 919, 26 S. E. 1008; *Weaver v. Mississippi etc. Boom Co.*, 28 Minn. 534, 11 N. W. 114. It is claimed by counsel for Pickens that he has a vested property in the fall of the water in Coal river, and doubtless has for all purposes of use as a riparian owner: *Gould on Waters*, sec. 204. He says he cannot be compelled to yield it without pay: *Chicago etc. R. R. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. Rep. 581; *Monongahela Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. Rep. 622.

“Here intervenes the reservation made by statute as to mill dams. But as this right is inseparably connected with the stream, I have never been able to separate the right to such fall from the mill dam, as the water and fall are used with it, and thus partake of its cast; that is, if the property in the dam is subject to the public right of navigation, if the grant of the dam right was accepted subject to it, the property in the water’s flow does not change it. It may be a question not so clear whether the reservation of navigation rights in the statutes above referred to were de-

signed for interior streams merely floatable by logs. If for any reason the legislature could not, under this navigation right, impair a mill right, the charter could not give the boom company any exemption from liability for damage. I do not express any opinion as to this, because I think the legislature has in section 28 shown a purpose not to exercise this right.

"I cannot agree to set aside the verdict because it gives prospective damages as for original and permanent injury. While the declaration goes for such damages, yet it is clear that if the nature of the injury is not permanent, impermanent damages may be given, and we cannot say permanent damages were given in the face of an instruction, which was given, that Pickens could 'not recover any damages that may have resulted to him since the institution of the suit, or which may accrue to him in the future by reason of injury complained of in the declaration.' "

A *Public Stream* may be used in a proper and reasonable manner for floating logs. One so using it is not answerable to a riparian proprietor for submerging his lands, unless it appears he was guilty of a want of care and prudence: *Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584; *Hopkins v. Butte etc. Co.*, 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817; *Gaston v. Mace*, 33 W. Va. 14, 25 Am. St. Rep. 848, 10 S. E. 60. Of course, if one exercises the right to float logs in a stream in an unwarranted manner, he will be answerable for resulting damages: *Alabama Lumber Co. v. Keel*, 125 Ala. 603, 82 Am. St. Rep. 265, 28 South. 204; *Carlson v. St. Louis River etc. Co.*, 73 Minn. 128, 72 Am. St. Rep. 610, 75 N. W. 1044; *Pascagoula Boom Co. v. Dixon*, 77 Miss. 587, 78 Am. St. Rep. 537, 28 South. 724.

The Respective Liability of the Lessor and the lessee for a nuisance on demised premises is considered in the monographic note to *Leahan v. Cochran*, 86 Am. St. Rep. 515-520.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CITY OF FOND DU LAC v. OTTO.

[113 Wis. 39, 88 N. W. 917.]

A CORPORATE OBLIGATION Need not be Signed With the Name of the Corporation, where it appears in the body of the writing that the corporation is the obligor, and it is signed with the signature of the proper officers, with his or their official title or titles. (p. 832.)

ASSESSMENT FOR TAXATION, to Whom Must be Made.—
A Special Administrator is an administrator, within the meaning of a statute requiring personal property in the possession of an administrator to be assessed to him. (p. 832.)

TAXATION.—Omitted Property may not be Assessed in the Following Year, when the statute of the state requires all property to be assessed on the first day of May in the year in which the assessment is made and in the assessment district in which the owner resides, and it appears to be assessable to an administrator who is not a resident in the assessment district in which such property was in the year when it was omitted from the assessment. (p. 833.)

Claim in the county court against the estate of Charles Otto, deceased, for taxes alleged to be owing from the estate. During the years 1896, 1897, 1898, and up to April, 1899, the decedent was a resident of the city of Fond du Lac and owned twenty shares of the Calumet and Hecla Mining Company, also a mortgage and certain bank deposits, all of which property was omitted from the assessment for the years 1896, 1897, and 1898 by mistake. After Otto died, C. H. Estabrooks was appointed special administrator, and thereafter, on June 7, 1899, letters testamentary were issued to him. During all the time that he was acting as special administrator and as executor

he was a resident of the town of Fond du Lac, but not of such city. As such special administrator he received the personal property in question. In 1899 the assessors of the city did not place any of the property on the assessment-roll, but in August of that year, the board of review gave notice to the executor and heirs of Otto of their intention to assess the estate for the years 1896, 1897, and 1898. After hearing the evidence, the board placed upon the assessment-roll of 1899 an assessment against the property for the years 1896, 1897, and 1898. The trial court concluded that the action of the board of review was without authority of law, and entered a judgment dismissing the claim. Plaintiff, the city of Fond du Lac, appealed.

J. M. Gooding and O. H. Ecke, for the appellant.

Giffin & Sutherland, for the respondent.

⁴² WINSLOW, J. It was first claimed by respondent that the circuit court acquired no jurisdiction of the appeal from the county court, because the undertaking was defective. The undertaking, after reciting the intention of the city to appeal, proceeded as follows:

"Now, therefore, we, the city of Fond du Lac, of said county, and W. H. Coughlin and T. E. Ahern, of said city, do undertake in the sum of two hundred and fifty dollars, that said city of Fond du Lac will diligently prosecute its appeal to effect, and to pay all damages and costs which may be awarded against him on such appeal.

"J. B. BECHAUD,

"Acting Mayor.

"W. H. COUGHLIN,

"T. E. AHERN.

"Attest:

"F. A. BARTLETT,

"City Clerk."

It is claimed that this is not the obligation of the city, but simply the personal obligation of Bechaud and Bartlett; that, in order to bind the city, it should have been signed, "The City of Fond du Lac, by J. B. Bechaud, Acting Mayor." This contention cannot be sustained. While the method suggested would doubtless have been a technically correct method ⁴³ of execution of a corporate obligation, it is now well settled that, where it appears in the body of the instrument that the

corporation is the grantor or obligor, then the instrument is well executed by the corporation if signed simply with the signature of the proper officer or officers, with his or their official title or titles; and, indeed, this method is now almost universally used: 4 Thompson on Corporations, sec. 5090; Devlin on Deeds, sec. 335; Haven v. Adams, 4 Allen, 80; Morris v. Keil, 20 Minn. 531.

Proceeding to the merits of the case, the question is presented whether, under section 1059 of the Statutes of 1898, as amended by chapter 50 of the Laws of 1899, taxes upon personal property which have been omitted during previous years may be assessed and recovered against the estate of the deceased owner, under the circumstances shown in this case. It was held in *State v. Pors*, 107 Wis. 420, 83 N. W. 706, that personal property omitted in one year may be assessed in the following year, under section 1059 aforesaid, notwithstanding the fact that it has passed out of the ownership of the person assessed, or out of existence. A different case, however, is here presented. The property here under consideration is property which must be assessed in the assessment district where the owner resides: Stats. 1898, sec. 1040. It must be assessed as of the first day of May in the year in which the assessment is made: Stats. 1898, sec. 1033. It must also be assessed to the owner, save as provided in section 1044. If in the hands of an executor or administrator on the 1st of May, it must be assessed to such executor or administrator. In but one case can it be assessed to the estate of the deceased owner, and that is when no executor or administrator has been appointed before the first day of May. In the present case the fact is undisputed that before the first day of May, 1899, one Estabrooks had been appointed special administrator of the estate, and was in possession of the property of the estate at that date. A special administrator is doubtless an administrator, within the meaning ⁴⁴ of the word as used in section 1044: *Hayden v. Roe*, 66 Wis. 288, 28 N. W. 186. In this case, therefore, the contingency had not arisen which allows the property to be assessed to the estate. There was an administrator duly appointed on the first day of May, and the property must be assessed to that administrator. But the administrator did not reside in the city of Fond du Lac. He resided in another assessment district. Therefore, the city could make no assessment against him of property which must be assessed at the residence of the owner. The conclusion seems inevitable that the city could not

make the reassessment attempted in this case. It could not assess the administrator, because he was a nonresident. It could not assess the estate, because there was an administrator in possession on the first day of May.

By the Court. Judgment affirmed.

The Signing of an Instrument as an officer of a corporation may import either an individual or a corporate liability: See *Kline v. Bank of Treseott*, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107, and cases cited in the cross-reference note thereto. But unless the promise in the body is that of the corporation, the obligation is prima facie that of the officers who subscribe: *Prescott v. Hixon*, 22 Ind. App. 139, 72 Am. St. Rep. 291, 53 N. E. 391; *Casco Nat. Bank v. Clark*, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908.

STOLZE v. MILWAUKEE AND LAKE WINNEBAGO RAILWAY COMPANY.

[113 Wis. 44, 88 N. W. 919.]

EMINENT DOMAIN—Title to Moneys Deposited Pending an Appeal.—If a statute authorizes a railway corporation to pay into court the amount awarded by commissioners, and thereupon to take and use the land for the purpose for which it was condemned, the corporation has not thereafter any title to, and cannot claim, such money, though the statute further provides that if the corporation appeals, the land owner cannot withdraw the money without first giving a bond to protect the corporation from loss in the event of the final reduction of the award. (p. 836.)

EMINENT DOMAIN.—The Manner in Which a Tender or Payment is Required to be Made to a land owner in proceedings to deprive him of his property is regulated by statute, and not by the common-law rules respecting tender of payment. (p. 837.)

EMINENT DOMAIN.—The Place of Deposit of Money Required to be Made by the Plaintiff seeking to acquire property by proceedings for its condemnation is, by the statutes of Wisconsin, with the clerk of the county wherein the proceedings are commenced, irrespective of the county in which they were tried or the judgment rendered. (p. 838.)

COSTS—Continuance of an Action for the Purpose of Recovering.—In the cases wherein it has been decided that an action cannot be continued merely for the recovery of costs after the cause of action sued upon has been satisfied, there was a settlement of some kind between the parties after the commencement of the suit, nothing being said about costs, not a mere tender of satisfaction not including costs up to the time of tender, or a tender not accepted. (p. 839.)

EMINENT DOMAIN—Costs in Collecting the Award.—If, after an award in favor of a land owner, he necessarily incurs expenses in an unavailing attempt to collect the amount of the award, such

expenses form part of the compensation which must be paid or tendered to him before he can be deprived of his property. (p. 842.)

EMINENT DOMAIN—Costs Incurred by Land Owner.—The compensation to be awarded a land owner in proceedings to acquire his property by the exercise of the right of eminent domain must include all necessary expenses incurred by him in the enforcement of his rights, which are taxable according to law. It must not be diminished by any costs reasonably incurred in condemnation proceedings, or in collecting the award which are taxable in favor of the prevailing party in an action or proceeding to make his judicial remedy available. (p. 842.)

EMINENT DOMAIN.—Until the Full Amount to Which a Land Owner is Entitled, Including Costs Incurred by Him, is paid to him, or into court for his benefit, he is justified in not taking any money deposited, and in standing on his strict legal rights and demanding interest on the judgment in the condemnation action until tender of the full amount to which he is entitled in payment thereof. (p. 843.)

Suit to restrain a railway company from appropriating the plaintiffs' lands to its use until compensation should be paid as required by law. The Manitowoc Terminal Company instituted proceedings to acquire the land in question for railway purposes, and on March 3, 1895, an award was made to plaintiffs of seventeen hundred and sixty-six dollars, and on the same day that amount was deposited by the railway corporation in the office of the clerk of the circuit court of Manitowoc county, where the report of the commissioners was filed, and thereupon the corporation took possession of the property by constructing its track thereon. Both parties appealed from the award. The appeals were consolidated and removed to the circuit court of Brown county, where, after a trial, the plaintiffs were awarded nine thousand dollars, and judgment was thereupon entered for nine thousand three hundred and sixty-six dollars and twenty-nine cents damages and costs, from which judgment an appeal was afterward taken, but thereupon the judgment was affirmed in June, 1898. A transcript of the judgment entered in the trial court was filed in the office of the clerk of Manitowoc county on July 1, 1897, and execution thereon issued was returned unsatisfied. Afterward plaintiffs, by a special proceeding, sought to sequester the assets of the corporation, and in this proceeding a receiver of the terminal company was appointed. Plaintiffs were not by such proceeding able to obtain satisfaction. The costs of the proceeding were, on October 23, 1898, duly taxed at eight hundred and ten dollars and thirty-six cents, in which sum the expenses of the receiver were included. After the affirmance hereinbefore referred to, the present action was commenced in the circuit

court of Manitowoc county, and the Milwaukee and Lake Winnebago Railway Company and the receivers of the Wisconsin Central Railway Company were joined as defendants. On September 30, 1899, a deposit was made in the office of the circuit court of Manitowoc county of the sum of eight thousand nine hundred and fifty-five dollars, which, with the sum of seventeen hundred and sixty-six dollars already on deposit, was claimed to be sufficient to satisfy the judgment. On February 8, 1900, supplemental answers were permitted to be filed, calling attention to, and pleading, this deposit. The receiver in the sequestration proceedings claimed that he was entitled to take the seventeen hundred and sixty-six dollars and administer the same as part of the assets of the Manitowoc Terminal Company. Plaintiffs neither took any part of the money paid into court for them nor consented in any way to the use of their land by the railway company. The deposits made for them did not include any costs incurred by them in attempting to enforce their judgment, nor any costs in the present action. The Manitowoc Terminal Company was insolvent, and all its rights were before the commencement of the action transferred to the Milwaukee and Lake Winnebago Railway Company, which at all of the times had knowledge of all the facts. At the commencement of the action, the receivers of the Wisconsin Central Railway Company were in possession of the property under a lease from the Milwaukee and Lake Winnebago company. The trial court decided that the right of way in controversy vested on the deposit being made on September 30, 1899, and that its effect was to defeat this action from the beginning, that the plaintiffs were entitled to costs in this action only as terms of allowing supplemental answers, and that the plaintiffs were entitled to withdraw the moneys deposited for them, but not to full costs in this case nor to the eight hundred and ten dollars and thirty-six cents expended by the plaintiffs. The plaintiffs appealed.

Timlin, Glicksman & Conway and G. G. Sedgwick, for the appellants.

Thomas H. Gill and C. H. Morris, for the respondents.

51 MARSHALL, J. This appeal turns, in the main, on the effect of the two deposits of money for the benefit of appellants in the office of the clerk of the circuit court, where the report of the commissioners in the condemnation proceeding was re-

corded. It is conceded that the two deposits, when made, were sufficient to satisfy plaintiffs' legal and equitable rights as they stood on the day the last deposit was made, September 30, 1899, except as to costs incurred in the enforcement of the judgment in the condemnation action and in this action, if the first deposit was then available to them. Counsel for appellants say it was not so available, because the receiver in the sequestration proceeding was entitled to take that fund and administer it as part of the assets of the Manitowoc Terminal Company. That contention is based on the theory that, notwithstanding the money was specially deposited for the benefit of plaintiffs, it still remained the property of the depositor. The statute under which the deposit was made does not seem to contemplate that, after such an act and the corporation takes possession of the property sought to be acquired and appropriates the same to its use, it has any control over the fund. Section 1850 of the Statutes of 1898 provides: "At any time after the making of such award the railroad corporation may pay to the owners of the lands so taken, or to the clerk of said court for the use of such owners, the amounts awarded by the commissioners, and thereupon may enter upon, take and use the land for the purposes for which it was condemned, and may move said court or judge, upon twenty-four hours' notice, that a writ of assistance may be issued to put such corporation into possession of the same; and said court or judge shall, upon the corporation giving security in such additional amount as the court or judge shall require to pay any judgment that shall be recovered against it on appeal, award such writ. If such corporation be in possession, or be put in possession, of such land pending an appeal, the owners or parties entitled thereto shall be entitled to receive the money paid into court on account of the award appealed from, without prejudice to the appeal taken."

⁵² It will be observed that, by the very terms of the statute, money deposited pursuant thereto is under the absolute control of the land owner. True, there is a further provision in the statute, following that we have quoted, to the effect that if the corporation seeking to acquire the land appeals from the award of the commissioners, the land owner cannot withdraw the money paid into court by such corporation without giving a bond to protect it from loss in case of a final reduction of the award. But that does not change the situation. There is nothing in that to indicate that the corporation, after depositing the money and taking possession of and appropriating the

land, can reclaim the fund or divert it in any way, especially while it insists upon its right to the land and continues in the enjoyment thereof.

We are not unmindful of the fact that in *Neilson v. Chicago etc. Ry. Co.*, 91 Wis. 557, 64 N. W. 849, it was held that the land owner who appeals from an award made in condemnation proceedings, and does not in the meantime take the money deposited for him, and succeeds in increasing such award, is entitled to interest on the whole amount finally awarded to him from the date of the first award. That was based upon the right of the land owner to refuse to part with his property or take any compensation therefor till that full and just compensation secured to him by the constitution shall be provided. It does not militate against the plain meaning of the statute that money, when once deposited in court for the land owner, in the circumstances under discussion, is at his disposal for the purpose of the deposit at any time he may see fit to claim it, and without any prejudice to his right, in due form of law, to pursue the appropriator of his property to obtain further compensation. While the land owner is not bound to withdraw the money, it is obviously placed beyond the control of the corporation. That is the plain meaning of the statute. It follows that the full amount of the first deposit made for appellants must be counted in determining whether the full ⁵³ amount to which they were entitled was at their disposal September 30, 1899.

Appellants' counsel further contend that the circumstances of the deposit do not satisfy common-law rules as regards tender of payment, to extinguish a cause of action or satisfy a judgment. It is a sufficient answer to that to say that the manner in which tender of payment is required to be made to a land owner, in proceedings to deprive him of his property by the power of eminent domain, is regulated by statute, and, so far as it is reasonably calculated to secure to such land owner the just compensation which the constitution guarantees him, it is exclusive.

It is suggested that, as this action was founded on the judgment rendered and recorded in the circuit court for Brown county, it is not affected by a payment to the clerk of the circuit court for Manitowoc county. True, but payment as made, even if it be held to have been sufficient to cover the judgment and subsequent costs necessary to its extinguishment, and the satisfaction of all claims of appellants requisite to divest them of their property, did not ipso facto discharge the judgment. But

that does not affect this case. If the statute authorized the payment to the clerk of the circuit court, where the condemnation proceedings were commenced and the report of the commissioners was filed, and required payment to be so paid as a condition precedent to the acquirement of the property by the railway company, except in case of consent of the owners to receive the money and execute a receipt in the form prescribed by the statute to be deposited in lieu of the money, then there was no other course to pursue than the one adopted. By reference to those parts of sections 1850 and 1851 covering the subject, it will be seen that the first section provides that the report of the commissioners shall be filed in the office of the clerk of the court where the proceedings were commenced, and that it shall be recorded in the judgment book of said court. The next section provides ⁵⁴ that, when payment of the award shall be made into said court, or a receipt shall be filed showing payment to the person entitled to the money, the clerk of said court shall minute the fact at the foot of the report of the commissioners in the judgment-book of said court, and that such latter circumstance shall be the final act necessary to divest the land owner of his property and appropriate it to public use. Obviously, there is but one place in which the corporation can in such circumstances deposit the compensation required to be given to the owner of the property sought to be acquired, and that is in the office of the clerk of the circuit court where the award of the commissioners is recorded, regardless of where the action on appeal from the decision of the commissioners may be tried, and the judgment embodied in the final result be recorded. If the report of the commissioners is recorded in one county, and the final award is made by judgment rendered on appeal in another county, as in this case, the deposit of the full amount to which the land owner is entitled in the former county will not of itself discharge such judgment of record; but it will operate as full payment thereof, and proof of the deposit may doubtless be made before the court in the latter county and an order be obtained discharging the judgment. The formal discharge of the judgment in such a case is not a condition precedent to the acquirement of the property sought by the corporation. Payment to the land owner, and the filing of his receipt showing such fact in the office of the clerk of the circuit court where the report of the commissioners shall have been recorded, or the deposit of money in that place, sufficient to cover the award, and the notation required at the foot of such record, complete the

forms of law necessary to convert the private property involved into public property.

It must be conceded that if, as a condition of the right to take appellants' property, they were entitled to reimbursement for their necessary expenditures in their efforts to realize ⁵⁵ upon their judgment in the condemnation action, the money deposited in court did not extinguish the cause of action in this suit, and the judgment rendered on a contrary theory is erroneous. The learned trial court held that payment into court of the face of such judgment, and interest up to the date of payment, and a proper notation thereof on the record of the report of the commissioners as provided in section 1851 of the Statutes of 1898, divested appellants of all interest in the real estate sought to be acquired, adverse to the railway company, and that, upon the defense of such payment being permitted in this suit by the supplemental answers, appellants were deprived of their cause of action as from the beginning, so that the suit could not thereafter proceed to judgment in their favor even for costs up to the time of the bringing in of the new defense, on the theory that they had any interest in the land in controversy at the time of the commencement of this litigation. That applied the doctrine that when a cause of action has been extinguished during the pendency of an action to enforce it, it cannot further proceed to recover costs, to different circumstances than it has ordinarily, we venture to say that it has ever, been applied to in any well-considered reported case. But the conclusion we have reached renders a decision of the question of whether the court rightly applied it unnecessary. It will be found, however, that in the cases where this and other courts have held that an action cannot be continued merely for the recovery of costs after the cause of action sued on has been satisfied, there was a settlement of some kind between the parties after the commencement of the suit, nothing being said about costs, not a mere tender of satisfaction not including the costs up to the time of the tender, or a tender not accepted: *Geiser T. M. Co. v. Smith*, 36 Wis. 295, 17 Am. Rep. 494; *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884; *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 17 Am. St. Rep. 131, 42 N. W. 232; *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612; *Bank of Commerce v. Elliott*, 109 Wis. 648, 85 N. W. 417; *Dunton v. Reed*, 17 Me. 178; *Osgood v. Green*, 33 N. H. 318; ⁵⁶ *Buell v. Flower*, 39 Conn. 462, 12 Am. Rep. 414; *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Canfield v. Eleventh School Dist.*, 19 Conn. 529; *Torry v. Hadley*, 14 How. Pr. 357.

The trial court gave effect to that part of section 1851 of the Statutes of 1898, material to the proposition suggested at the opening of this opinion, according to the letter thereof, holding that costs incurred in endeavoring to collect a judgment rendered in a condemnation proceeding are not a part of the judgment, and that payment of the face of the judgment and interest from its date, in the manner indicated in the section, and a notation thereof as therein indicated, regardless of the property owner's expenditures in fruitless attempts to collect the judgment, operates to take his property against his will, and vest it absolutely in the corporation seeking to obtain it for railway purposes. The particular language of the section is as follows: "When no appeal shall be taken from any award within the time provided by law, and the corporation shall have paid the amount thereof into the court or filed a receipt therefor, duly signed by the owner and acknowledged before an officer authorized to take the acknowledgment of deeds, in the office of the clerk of the court, or when, after the determination of such an appeal, the railroad corporation shall have paid into court the amount of the judgment rendered thereon, or filed a receipt therefor as aforesaid, the clerk of said court shall make a minute of such payment or of the filing of such receipt at the foot of the record of the report of such commissioners in the judgment-book of said court; and thereupon the exclusive use of said premises, and every part and parcel thereof, shall vest in such corporation, its successors and assigns, so long as used for railroad purposes."

What do the words "paid into court the amount of the judgment rendered thereon" mean? Such meaning must be held to be broad enough to secure to the land owner, under all circumstances, a just compensation for his property before being deprived thereof, or the legislation must be condemned as partly or wholly unconstitutional. The constitution guarantees ⁵⁷ that private property shall not be taken for public use without just compensation being first made therefor: Const., art. 1, sec. 13. If the trial court decided rightly, then the entire compensation awarded to a person by the forms of law in the proceedings to take his property by the right of eminent domain may be necessarily dissipated by him in fruitless endeavors to collect it, and yet, by the payment into court of the mere face of the award and interest thereon from its date, such property may be appropriated against his will for public purposes, not by an exchange of equivalents, but, in effect, by confiscation.

Neither argument nor the citation of authority, it seems, is needed to demonstrate that a construction of the statute rendering the result indicated possible would call for its judicial condemnation as not satisfying the constitutional guaranty to which we have referred. If we must say the meaning the trial court ascribed to the statute accords with the plain letter thereof, then it follows that the statute is absurdly unreasonable and is unconstitutional, and we must look for some other meaning that will avoid such result and test this appeal thereby. If no such meaning can be discovered, we must determine the rights of the appellants independently of the statute, testing them by the constitutional guaranty.

The subject of whether the necessary costs incurred by a person in efforts to obtain a just compensation for property sought to be taken from him for public purposes by the power of eminent domain form a part of such compensation, and must be paid or tendered before he can be deprived of his property, has received attention in many courts and by eminent text-writers. In 2 *Lewis on Eminent Domain*, second edition, section 559, the opinion is expressed and well supported by authority, that any law which casts the burden upon the land owner of paying the costs necessarily incurred by him in having the compensation ascertained, to which he is entitled for property sought to be taken from him by the power ⁵⁸ of eminent domain, is unconstitutional. Since actual payment of the compensation is as essential under the constitution as its ascertainment, obviously, expenses necessarily incurred in enforcing such payment are as necessary to that full and just compensation secured to the property owner by the constitution as are costs incurred in having the amount of the compensation ascertained. In *San Francisco v. Collins*, 98 Cal. 259, 33 Pac. 56, it was held that the authority of the courts to allow or withhold costs as a part of the compensation to be awarded to a land owner, as a condition of his being deprived of his property by the power of eminent domain, must be tested by the constitutional guaranty that no such deprivation shall occur except upon condition that just compensation be made to the owner for the property taken; and that the amount of the damages to which the property owner is entitled cannot rightly be diminished by expenses incurred in obtaining the same, so that he will not in the end receive that full compensation for his property which the appropriator thereof in justice ought to pay. In *Ebling v. Dickson*, 170 Ill. 329, 48 N. E. 1001, where the same subject was consid-

ered, this language was used: "Where private property is taken or damaged for public use, just compensation cannot be made to the property owner if he is compelled to proceed in the courts for his just rights at his own costs." In *Dolores etc. Canal Co. v. Hartman*, 17 Colo. 138, 29 Pac. 378, it was held that the costs necessarily incurred by a person in enforcing his constitutional right to a just compensation for property sought to be taken from him by the right of eminent domain are a part of the just compensation for such property, to which he is entitled under the constitutional guaranty in that regard. It was suggested that any other rule would result in a possible taking of property without rendering the owner thereof any compensation whatever, because of his being compelled to expend an equivalent of the amount finally awarded to him in trying to obtain it.

59 The cases cited voice the true spirit of the constitutional guaranty. It cannot have been the purpose of the framers of the constitution that a person compelled to surrender his property for public uses shall have any less as compensation therefor than a full equivalent, measured by all reasonable rules. That must include all necessary expenses incurred by him in the enforcement of his rights, which are taxable according to law. He must have in the end a full, just compensation for his property. It must not be diminished by any costs reasonably incurred in condemnation proceedings, or in collecting the award, which are ordinarily taxable by the rules of law in favor of the prevailing party in an action or proceeding to make his judicial remedy effective. That is the true constitutional measure of his rights. If it cannot be found expressed within the scope of section 1851 of the Statutes of 1898, then we have before us another instance evidencing the vast importance of constitutional limitations for the protection of personal and property rights. We shall not spend time to demonstrate that rules for judicial construction will enable us to so bend the words of section 1851, "paid into court the amount of the judgment," out of their ordinary meaning as to include all costs allowed by law, necessarily incurring in the enforcement of the judgment. Suffice it to say that they must be so bent to satisfy the demands of the constitution.

It follows that the just compensation which appellants were entitled to receive as a condition of their property being appropriated for railway purposes September 30, 1899, in addition to the amount then and previously deposited for their benefit in the office of the clerk of the circuit court for Manitowoc county, was the costs incurred by them in the special proceed-

ing to enforce the judgment rendered in the condemnation action, and such costs as were properly taxable in their favor in this action up to that time. If the respondents desired to then stop the litigation, they should have applied to the court in this cause for an adjustment of such costs, to the ⁶⁰ end that they might pay them, and then paid them to appellants or deposited the same in court for their use, together with the deposit that was made.

Since the full amount which appellants were entitled to receive was not paid to them or into court for their benefit, under the rules laid down in *Neilson v. Chicago etc. Ry. Co.*, 91 Wis. 557, 64 N. W. 849, they were justified in not taking the money which was deposited, and in standing upon their legal rights and demanding interest on the judgment in the condemnation action till tender of the full amount to which they were entitled or payment thereof into court.

A point is made in the brief of counsel for respondents that the eight hundred and ten dollars and thirty-six cents taxed as costs in the sequestration proceeding instituted by appellants in the condemnation proceeding included the costs and expenses of the receiver and were taxed at his instance. That accords with the findings filed in this action; but the court found that the eight hundred and ten dollars and thirty-six cents was allowed as and for the costs and expenses incurred by appellants in the condemnation action subsequent to judgment. All such costs and expenses were incurred at the instance of appellants, and primarily for their benefit; they were the losers thereof unless collected of the adverse party. They are just as legitimately entitled to be reimbursed for them as for any others incurred in securing compensation for their property. They were not taxable as costs in this case, as contended for by appellants' counsel, for they were not costs incurred in this case. But payment thereof should have been enforced by the court as part of appellants' compensation for their property; or, to put it more accurately, to the end that the compensation awarded to them by the judgment in the condemnation proceedings should not be diminished by the necessary expenses incurred in collecting it.

The result of the foregoing is that the judgment must be reversed and the cause remanded, with directions to enter judgment giving the appellants the relief previously adjudged ⁶¹ as regards the farm crossing; also, in form, for a recovery of the costs taxed and allowed to them against respondents in this ac-

tion; further, adjudging that appellants are entitled to be paid, as a condition precedent to being deprived of their property sought to be acquired for railway purposes, in addition to the money heretofore paid into court for them, interest on the judgment rendered in the condemnation action from September 30, 1899, to the date the money deposited in court was withdrawn by them, specifying the amount of such interest down to the date of the corrected judgment; also the eight hundred and ten dollars and thirty-six cents allowed for costs in the condemnation proceedings subsequent to judgment, and interest thereon from the date of the taxation of such costs, specifying the amount in the aggregate at the time of entering the corrected judgment; and the costs and disbursements of this action as taxed, and such further costs as may be allowed them in the proceedings to perfect the judgment; and that appellants are further entitled to an injunction restraining the use of the land sought to be acquired, as prayed for in the complaint, unless said several sums are paid, and interest thereon from the date of the corrected judgment.

By the Court. So ordered.

The Costs and Expenses to the owner incurred in condemnation proceedings are proper elements of the damages to be awarded him for the taking of his land: See the monographic note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 313.

RAY v. STUCKEY.

[113 Wis. 77, 88 N. W. 900.]

NEGLIGENCE, CONTRIBUTORY, in **Exposing Livestock to Barbed-wire Fence**.—In an action by one land owner against another to recover for injuries to the livestock of the plaintiff from a barbed-wire fence between their lands, he cannot recover if guilty of contributory negligence, and he must be adjudged so guilty if he turned his stock into a pasture adjoining the fence, knowing that it was in a dangerous condition and likely to inflict the injury of which he complained. (p. 846.)

Paul Meyer and O. B. Thomas, for the appellant.

Palmer & Whitman, for the respondent.

⁷⁸ CASSODAY, C. J. This is an action to recover damages for injuries sustained by the plaintiff's mare being torn and

lacerated June 28, 1898, by reason of becoming entangled in an alleged partition fence built and maintained by the defendant wholly upon his own land, and which is alleged to have been so negligently and dangerously constructed as to endanger the lives and safety of the plaintiff's horses and other domestic animals pasturing on his adjoining lands. The defendant answered by way of a general denial. At the close of the testimony the jury returned a verdict in favor of the plaintiff, and assessed his damages at forty dollars. From the judgment entered thereon for that amount, with costs, the defendant brings this appeal.

For the purposes of this appeal, we assume that the defendant was bound to maintain the fence in question, and keep the same in good condition and repair, at the time and place of the accident, and that he failed and neglected to do so, and that, by reason of such negligence, animals pasturing in the adjoining lands were exposed to the danger of being injured by the barbed wire stretched thereon. But it appears from the plaintiff's testimony, and is undisputed, that the plaintiff knew all about the condition of the fence prior to the injury; that he spoke to the defendant at "different times prior to the time of this accident, asking him if he would put in a good safe fence there"; and that the defendant told him that "he had the posts all made to put in, and as soon as he got a little time he would do it," but that he had "never done it." With such knowledge, the plaintiff caused the mare to be turned into his own pasture, adjoining the fence in question, and thereby exposed her to the danger mentioned. Such being the action and knowledge of the plaintiff, the question recurs whether he can recover damages from the defendant for the injury thus sustained. In obedience to a long line of adjudications of this court, we must hold that he cannot. A few of such cases are here cited. Thus, in an opinion by ⁷⁹ Chief Justice Ryan, reviewing the prior cases, it was held, in effect, that in actions against a railroad company for injury occasioned by a failure to maintain fences on the line of its road, as in other actions for negligence, contributory negligence of the plaintiff is a complete defense: *Curry v. Chicago etc. Ry. Co.*, 43 Wis. 665, 675 et seq. In the opinion it is tersely stated that "when the negligence of both parties co-operates alike in producing the injury, the action does not lie." To the same effect, *Carey v. Chicago etc. Ry. Co.*, 61 Wis. 71, 20 N. W. 648; *Martin v. Stewart*, 73 Wis. 553, 41 N. W. 538; *Peterson v. Northern Pac. Ry. Co.*, 86 Wis. 206,

56 N. W. 639; *McCann v. Chicago etc. Ry. Co.*, 96 Wis. 664, 71 N. W. 1054. The trial court may have been misled by the fact that the motion for a nonsuit was not made upon the ground of the plaintiff's contributory negligence. The question of contributory negligence was not submitted to the jury, and, as it appeared from the undisputed evidence, the case should not have been submitted to the jury. However, the question is presented by the motion to set aside the verdict and grant a new trial. Certainly, the plaintiff should not recover damages for an injury caused in part by his own contributory negligence.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Defective Fences.—A railroad company neglecting to keep a barbed-wire fence in repair as required by statute, is liable to the owner of adjoining lands for injury, caused by such fence, to his horses, which he has turned out in the highway to graze; and the plaintiff is not guilty of contributory negligence, although at the time he turned his horses loose he knew the character and condition of the fence: *Siglin v. Coos Bay Co.*, 35 Or. 79, 76 Am. St. Rep. 463, 56 Pac. 1011. See, in this connection, *Kuhnert v. Angell*, 10 N. Dak. 59, 88 Am. St. Rep. 675, 84 N. W. 579.

TOMSECEK v. TRAVELERS' INSURANCE COMPANY.

[113 Wis. 114, 88 N. W. 1013.]

INSURANCE, LIFE—Payment of Premium.—It Will not be Presumed that a General Agent of a life insurance corporation has authority to issue a policy for anything but money. (p. 848.)

INSURANCE, LIFE—Waiver of Payment of Premium.—An agent of a life insurance company has no implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor equivalent to money to the corporation when taken. (p. 849.)

INSURANCE, LIFE.—A Policy Delivered by an Agent Without Exacting Payment of the Premium under an agreement between him and the assured that the agent would accept as payment his own indebtedness for meat, and take meat for the balance, is void, where the policy contains a condition requiring all premiums to be paid at the home office, but provides that payments will be accepted if paid to the agent in exchange for a receipt signed by the president or secretary and countersigned by the agent, and that the policy shall not take effect unless the first premium is paid while the assured is in good health. (p. 852.)

Action on a policy of insurance containing the following condition: "All premiums are payable at the home office in Hartford, Connecticut, but will be accepted if paid to an agent in exchange for a receipt signed by its president or secretary and countersigned by the agent designated thereon. This policy shall not take effect unless the first premium is paid while the insured is in good health." Tomsecek, whose life was insured, was a copartner in the business of running a meat market with Enright. With the consent of Enright, Tomsecek, and Webb, as agent for the defendant company, agreed that a policy should be taken by the company on the life of Tomsecek, the first premium to be paid by giving the agent credit at the meat market as payment for meat furnished and thereafter to be furnished. The policy forwarded to the agent for delivery was by him sent to the insured by mail, the latter being, without the knowledge of the agent, then in a hospital too ill to do business. The policy was received at the firm's place of business, but never brought to the knowledge of the insured. No credit was given for the first payment on the policy as agreed upon, nor was the premium ever paid in any way. The trial court excluded all evidence as to whether the agent had authority to accept anything in the payment of the first premium except money, upon the theory that the controversy was to be solved solely by the writings. The jury returned a verdict in favor of the plaintiffs for the amount of the policy, after first crediting the defendant with the first premium remaining unpaid. The defendant appealed.

A. H. Long and W. E. Howe, for the appellant.

J. P. Evans and O. B. Thomas, for the respondents.

¹¹⁷ MARSHALL, J. Many suggestions are made in the briefs of counsel for respondents why the judgment is right and should be affirmed, which, in our view of the case, need not be considered. The learned trial court rightly decided that if the agreement between Tomsecek and appellant's agent, that the first premium on the policy might be paid otherwise than in money, and the delivery of the policy pursuant to such agreement, constituted a waiver by the company of payment of such premium and of the condition that the policy should not take effect unless such payment should be made while Tomsecek was in good health, then the policy took effect before Tomsecek died and plaintiffs were entitled to recover; otherwise appellant is

entitled to judgment. Was the decision of that question in respondents' favor right? That is the proposition upon which this appeal turns.

Many authorities are cited to our attention to the effect that possession of a policy by the assured at the time of his death *prima facie* establishes all conditions necessary to its having taken effect as a binding insurance contract in his lifetime, notwithstanding it contains a stipulation that it shall not take effect unless the first premium is paid while the assured is in good health; that if such payment was not in fact made, a waiver thereof will be presumed in the absence of evidence to the contrary. Some of such authorities hold to ¹¹⁸ rather an extreme doctrine when applied to a policy which does not contain a receipt for payment of the first premium and indicates that an independent instrument, evidencing such payment, is to be delivered to the assured upon such payment being made, as in this case. To that extent they are not in harmony with *McDonald v. Provident etc. Soc.*, 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154, and do not meet with our approval. The trial court applied the doctrine of such authorities to this case, and in that, as it seems, committed error. The court went further, not only holding that the agent waived, and had implied authority to waive, payment of the first premium while the applicant for insurance was in good health, but waived, and had authority to waive, payment of such premium in money and to make an agreement, binding on appellant, that payment might be made by applying the amount of the premium on the agent's indebtedness for meat and as a credit entitling him to further delivery of meat. The principle is familiar that the authority of an agent as to waiving conditions of an insurance policy before it takes effect is pretty broad, but it does not go beyond his actual authority and that reasonably implied from the nature of the business carried on. The rule in that regard is the same in respect to an agent for an insurance company as any other. There is no claim that the agent had actual authority to make the agreement found by the jury, so his authority in that regard must be tested wholly by what may be reasonably implied. It may be admitted that Webb was a general agent, and still the difficulty is not lessened, because it cannot be implied that he had any authority in excess of the power of the corporation, and it must be presumed that such power did not include the issue of policies of life insurance for anything but money.

Several cases are cited to our attention to sustain the decision that an agent may receive the conditions of an insurance policy calling for payment of the first premium in money, but none of them fit the facts of this case. The nearest approach ¹¹⁹ to a situation similar to the one under consideration is that involved in *John Hancock Mut. Life Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795. There the agent agreed to waive payment in money of a part of the first premium, such part not exceeding the amount allowed to him as his commission. The policy was sustained upon the ground that payment of the full amount going to the company was made in money, the court inferentially holding that the agent had no authority to waive payment thereof. The decision followed *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545, where the agent agreed to take part payment of the first premium out of the assured's saloon. In respect to the defense of non-payment of the first premium in money, the court said: "As the amount paid in cash was more than enough to pay the premium on this policy, we see no ground for holding that the premium was not all paid in cash." The agent "was entitled to commissions for procuring the insurance, and if he saw proper to take out his commissions in the saloon, we know of no reason or authority to debar him from doing so."

So many loose expressions are found in text-books and legal opinions as well, as to the power of a general agent of an insurance company to waive the conditions of a policy calling for payment of premiums in money, that it is not to be wondered at that attorneys and courts as well sometimes go astray. A careful analysis of the authorities will show that with few exceptions, which are not of sufficient significance to be followed, the idea that the agent of an insurance company has implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor an equivalent to money to the insurance company when taken, has no support. In *May on Insurance*, section 360d, it is said: "An agent authorized to deliver policies and receive payment may waive the payment of the premium in cash notwithstanding a stipulation in the policy to the contrary," citing *Home Ins. Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

¹²⁰ In that case the agent agreed to receive credit on his own debt to the assured for the amount of the first premium and

to pay the insurance company the amount thereof, which agreement was fully carried out, the company actually receiving payment in money. The decision was grounded on the fact that the company received cash for the first premium, substantially according to the contract. The court said: "We are not required to decide what the rights of the parties would have been in case the agent had failed to give the company credit and remit in the usual course."

However, the court quoted, without explanation or qualification, and in a way to lead one astray if he fails to examine the supporting authorities, from section 360 of May on Insurance, this language: "If the agent be authorized to receive the premium, an agreement between the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent," citing *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Home Ins. Co. v. Curtis*, 32 Mich. 402; *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300, 309.

The text in May is supported by *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565, and *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344. In the last case mentioned the agreement was to the effect that the agent should give the assured time to make the first payment. There was no waiver of payment in money. In *Sheldon v. Connecticut Mut. Life Ins. Co.*, 25 Conn. 207, 65 Am. Dec. 565, the facts were that the agent agreed to give the applicant time to make payment of the first premium, to take his note, payable to the company on short time for one-half thereof, and his promise to pay such agent the other half, and to personally make the cash payment to the company. It was the custom between the company and the agent to charge the amount of the first premium to the
121 latter upon forwarding to him the policy for delivery, and for the agent to make settlements with the company from time to time, and to remit money on account. There was no waiver of the payment in money, only a waiver of the time of payment. In *Home Ins. Co. v. Curtis*, 32 Mich. 402, the agent advanced the money for the assured for the first premium, actually paying it to the company, and it was held that there was a sufficient compliance with the provision of the policy requiring payment of the first premium as a condition of the policy

going into effect. In *Willcuts v. Northwestern Mut. Life Ins. Co.*, 81 Ind. 300, 309, the facts were that the policy was issued to one of the medical examiners of the company, and it was agreed between him and the agent that the dues to the applicant for services as medical examiner might be applied on the premiums. It was held that such agreement was binding on the company as to services actually rendered before the premium became due, because, to that extent, it did not really constitute a waiver of payment in money, as the amount due to the examiner from the company was equivalent to it to a cash payment to that extent.

Enough has been said to indicate the character of the authorities relied upon to show that a general agent of an insurance company has implied authority to waive the provision of an insurance policy calling for payment of the first premium in money. None of them go to the extent of holding that the agent may waive such payment and take something in lieu thereof which does not amount to payment to the corporation in cash, such as an agreement on the part of the agent to take pay for a premium in meat, no credit being given or payment actually made to the agent, or credit being given by him to the corporation in the usual course of business. The precise question we have here was decided in *Hoffman v. John Hancock Mut. Life Ins. Co.*, 92 U. S. 161. There the first premium was paid to local or special agent, by consent of the general agent of the company, in a horse, ¹²² the cancellation of an indebtedness of the special agent to the applicant for insurance, a note to such agent and a note to the corporation. The transaction was held void, Swayne, J., who delivered the opinion of the court, saying: "It is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting"; and the implication to that effect "is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise."

It was further said, in effect, that as life insurance is a cash business, the agent of an insurance company, whether he be a general or a special agent, has no implied authority to take or agree to take personal property, such as a horse, in payment of a premium upon an insurance policy; that such an agreement, even if made by the company itself, would be *ultra vires*, and if made by an agent without the knowledge

of the company, it would not only be ultra vires but a fraud both upon the part of the agent and the applicant for insurance, for the latter must be presumed to know that an insurance premium cannot be legitimately paid in horses.

It would seem that nothing further need be said to show that the policy in question never became binding upon appellant. The jury found that the agent agreed to accept his own indebtedness for meat as part payment for the first premium and to take meat for the balance thereof. It is undisputed that such agreement was never carried out by the insured so as to obligate the agent to pay the company. Neither the company nor the agent received pay for the first premium. There is no analogy between this case and one where the agent merely agrees to give the applicant for insurance time to make the first payment, or agrees that he will advance the amount of the first payment himself, and actually does advance it, or agrees to charge himself with the first premium in his account with the company, according ¹²³ to a custom of doing business between himself and his principal, thereby becoming liable to the company. We must hold here that the agent had no implied authority to use the appellant's policy of insurance to pay his meat bills or to build up a credit for future purchases of meat. There are no circumstances disclosed in the evidence to avoid the effect of that conclusion. The motion made by appellant's counsel for judgment on the special verdict should have been granted and the duty devolves upon this court to reverse the judgment and remand the cause, with directions to strike out the general verdict and render judgment in favor of defendant on the special verdict, dismissing the complaint with costs.

By the Court. So ordered.

The Payment of the Premium on an insurance policy may be waived by giving credit to the insured: See the monographic note to New York Life Ins. Co. v. Babcock, 69 Am. St. Rep. 150, 151. Compare McDonald v. Provident etc. Assur. Soc., 108 Wis. 213, 81 Am. St. Rep. 885, 84 N. W. 154. It has been held that a contract of insurance is established where an agent, with authority to receive applications and accept risks, agrees to insure certain property, and the terms of the policy are fixed, though the premium is not paid, the agent being indebted to the insured and having on previous occasions issued policies crediting the premium on account: Western Assur. Co. v. McAlpin, 23 Ind. App. 220, 77 Am. St. Rep. 423, 55 N. E. 119.

BLACK v. STATE.

[113 Wis. 205, 89 N. W. 522.]

STATUTES Adopted from Another State, Construction of.—If a statute, after its construction by the courts of the state wherein it originated, is adopted as a statute of another state, such construction must be followed in the courts of the latter. (p. 856.)

INHERITANCE TAXES.—A Succession Tax is a tax on the privilege of receiving property, and not a tax upon property. (p. 860.)

FOURTEENTH AMENDMENT, Taxation Which Violates.—A tax law which makes unjust discrimination—which taxes one person at one rate and another one within the same class, under like circumstances, at another rate, or exempts him altogether—denies the equal protection of the law. (p. 862.)

INHERITANCE TAXES—Exemption, Reasonable Amount of. An exemption from inheritance taxes of all estates under ten thousand dollars in value cannot be held unreasonable as to amount. (p. 863.)

INHERITANCE TAXES — Unreasonable Discrimination.—When a statute imposing inheritance taxes undertakes to exempt therefrom all estates whose value is less than ten thousand dollars, the beneficiaries being of the same class, and the tax being levied without regard to the amount received by the individual beneficiary, the classification is arbitrary, and the statute therefore unconstitutional. (p. 864.)

Appeal from a judgment requiring the executors of the estate of John Black, deceased, to pay an inheritance tax upon personal property transferred by his will. He was at and for some years prior to his death a citizen, inhabitant, and taxpayer of the city and county of Milwaukee. His personal property was assessed and was taxable in said city and county. He owned real estate therein of the taxable value of more than ten million dollars, and personal property of the taxable value of nearly three hundred and fifty-five thousand dollars. He bequeathed one thousand dollars to the Home of the Aged, two thousand dollars to the St. Rose Orphan Asylum, one thousand dollars to Right Reverend Archbishop Katzer in trust for the use and benefit of St. John's Catholic Parish, these being corporations organized for religious, charitable and educational purposes. He bequeathed two thousand dollars to his sister in law, Mrs. Louise B. Stamm, two thousand dollars to his brother in law, Barney S. Schoeffel, two thousand dollars to his sister, Katherine Mayer, two thousand dollars to his brother, Peter Black, and the residue of his personal estate to his daughters, Elizabeth M. Black and Louise C. Clark. The trial court determined that the bequests to

Mrs. Stamm and Mr. Schoeffel were subject to an inheritance tax of five per cent, the bequests to Katherine Mayer and Peter Black to a tax of one per cent, and that a like tax as assessable on the transfer of two hundred and eighty-five thousand seven hundred and forty-seven dollars and ninety-two cents, the undivided interest of Elizabeth M. Black and Louise C. Clark. From this assessment of taxes the executors appealed.

Winkler, Flanders, Smith, Bottum & Vilas, for the appellants.

The attorney general, W. H. Bennett, district attorney, and F. E. McGovern, assistant district attorney, for the respondents.

209 WINSLOW, J. In the present case chapter 355 of the Laws of 1899, entitled "An act for a tax on gifts, inheritances, bequests and legacies in certain cases," is attacked as unconstitutional. The act in question provides for the imposition of a tax upon any transfer of personal property of the value of ten thousand dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to any persons or corporations, except corporations organized for religious, charitable, or educational purposes, which use the transferred property solely for such purposes, in the following cases: 1. When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of this state; 2. When the transfer is by will or intestate law of property within this state, the deceased being a nonresident at death; 3. When the transfer is made by a resident or by a nonresident, the nonresident's property being within the state, by bargain, sale, or gift made in contemplation of the death of the vendor or donor, or intended to take effect at or after such death. The act further provides that the tax shall be imposed **210** when any beneficiary is entitled to such property by any such transfer, whether made before or after the passage of the act, and that the tax shall be at the rate of five per centum per annum upon the clear market value of the property transferred, except that when the property passes to the decedent's father, mother, husband, wife, child, brother, sister, and certain other specified near relatives, it shall not be taxed unless of the value of ten thousand dollars or more, and then only at the rate of one per centum upon the clear market value thereof. The law also provides that such tax shall be a lien upon the property transferred

until the tax is paid, and contains full and specific administrative provisions regulating the manner in which it is to be collected, the appraisal of the property, and the powers and duties of district attorneys, the county courts, and the Secretary of State in the matter of making collection of such taxes. All taxes so collected, less expenses of collection, are to be paid into the state treasury, to be used for the expenses of the state government, and for such other purposes as the legislature shall direct, but the county treasurer is to retain for the use of his county fifteen per cent of any tax collected in his county. Section 19 of the act, among other definitions, defines the words "estate" and "property," as used in the act, to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, and not the property or interest passing to individual legatees, devisees, heirs, next of kin, donees, or vendees. A number of sections of the act were amended by chapter 245 of the Laws of 1901, but none of the amendments affect in any material respect the provisions of the law which are attacked in this case, and hence it is not deemed necessary to state the effect of the amendments.

The tax which this law authorized is what is generally known as an "inheritance" or "succession" tax. Such taxes are very ancient in origin, and have been long in use, especially in European states. The states of the Union have been ²¹¹ singularly slow in adopting such laws, but the number of states to adopt and enforce them is increasing year by year.

To review the history of such legislation would be a mere affectation of learning, and would serve no useful purpose in the decision of this case. The Wisconsin tax commission, in their report submitted to the legislature in the year 1898, justly say: "It is very clear that the overwhelming weight of judicial authority sustains legislation of this character, and equally clear that, in the wealthiest and also the most progressive states, statutes exist or are being enacted for the collection of succession taxes."

It was doubtless in response to the favorable recommendation of the commission that the present law was passed at the following session of the legislature. Examination of the law shows that it is in all essential respects a literal copy of the New York law (Laws 1892, c. 399, as amended), with the important exceptions that in the New York law all transfers to collateral kindred and strangers of the value of five hundred dollars or over are taxed, while in the Wisconsin law such transfers

are not taxed unless they equal or exceed ten thousand dollars, and that in New York the tax is imposed upon transfers of both real and personal property, while in Wisconsin it is confined to personal property alone. Section 19 of the Wisconsin law, so far as it defines the words "estate" and "property," is identical with section 22 of the New York law. It will be well to ascertain at the outset what construction had been placed upon the New York law before we adopted it, because, upon very familiar principles, so far as the provisions are identical, or substantially so, such construction must be followed here. The law first appeared upon the statute-books of New York as chapter 483 of the Laws of 1885, and it was then purely a law taxing collateral inheritances or transfers exceeding five hundred dollars, at the rate of five per cent. Inheritances or transfers to lineal descendants and certain near relatives were entirely excepted from ²¹² its operation. This law was challenged as unconstitutional in *In re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685. The principal grounds upon which it was challenged were: 1. That it violated a clause of the New York constitution providing that every law imposing a tax "shall distinctly state the tax and the object to which it is to be applied"; 2. That it did not provide for notice or opportunity to be heard, and so was not "due process of law"; and 3. That it conferred prohibited powers upon surrogates' courts. All these objections were overruled, and the law sustained. The question whether it was a tax on property, or a tax upon the succession or devolution of property, was not decided. It is said that in either case it is constitutional, because it has never been questioned that the legislature may tax sales of property, incomes, acquisitions, and transfers of property, and that, if it be regarded as a tax on property, then it is free from objection if it be equally imposed and properly apportioned upon all property of the class to which it belongs. The act was amended by chapter 713 of the Laws of 1887, but not in any respect material to the present discussion. It still remained purely a collateral inheritance tax law. Two cases were decided immediately following the amendment, viz.: *In re Cager's Will*, 111 N. Y. 344, 18 N. E. 866, and *In re Estate of Howe*, 112 N. Y. 100, 19 N. E. 513; but the only material question decided in these cases was that the five hundred dollar limitation in the act referred to the portion of the property passing to the legatee or beneficiary, and not to the whole estate left by the testator or grantor. Then followed, after an interval, the case of *In re Estate of Swift*, 137 N. Y.

77, 32 N. E. 1096, in which it was distinctly held that the tax is not a tax on property, but on the right of succession or devolution. The first case arising under the law of 1892, which, as has been said, is the prototype of our own law, was the case of *In re Hoffman's Estate*, 143 N. Y. 327, 38 N. E. 311, in which it was held that the tax was still upon the right of succession, and not upon the property of the decedent's estate, but that by ²¹³ section 22 of the act (corresponding to section 19 of our act) the construction given to the previous law in the *Cager* and *Howe* cases, to the effect that the limitation of five hundred dollars applied to the individual shares received, and not to the whole estate of the grantor, was reversed, and that the limitation under the act of 1892 applied to the aggregate value of all the property transferred, and not to the separate value of each individual transfer. In the case of *In re Dows' Estate*, 167 N. Y. 227, 60 N. E. 439 (decided two years after our statute was passed), it was again held that the tax was a tax on the right of succession, and not on the property. It is not believed that there are other cases in New York throwing light upon the question. There is one respect in which we receive help from the New York decisions, and that is as to the construction of section 19 of our act which defines "estate" and "property." The New York courts having held before our adoption of the section that it operated to apply the limitations of the act to the aggregate value of the entire property or estate transferred, and not to the share of each individual beneficiary, we must and do apply the same construction to the section.

In other respects, however, the New York decisions give us little, if any, help. The only time that the question of constitutionality was considered by that court was in the early case of *In re McPherson*, 104 N. Y. 306, 58 Am. Rep. 502, 10 N. E. 685; and the law then challenged was the collateral inheritance law of 1885, which simply levied a tax of five per cent on all collateral inheritances or transfers exceeding five hundred dollars in amount. This was a uniform tax without discrimination, upon all persons belonging to a certain and properly defined class. Were this the law now on our statute-books, we should have no difficulty in sustaining it, even under our own constitution. It seems to have been attacked on grounds entirely foreign to the present discussion, arising out of provisions of the constitution of New York which are peculiar to itself. The constitution of that state contains no provisions as to uniformity of taxation, although ²¹⁴ it does contain the usual

guaranties of equality before the law of all citizens: N. Y. Const., art. 1, secs. 1-6. Whether the act of 1892 in any respect violates such rule of equality, or infringes upon the fourteenth amendment to the constitution of the United States, which prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws," are questions which have never been raised or passed upon in the state of New York, so far as we are able to ascertain.

Taking the law, then, with this construction of the words "estate" and "property," we are to consider the question as to its constitutionality. The appellants' claim is that the act violates section 1, article 8 of our constitution, providing that "the rule of taxation shall be uniform and taxes shall be levied upon such property as the legislature shall provide"; also that it denies the equal protection of the laws, in violation of the fourteenth amendment to the federal constitution.

In entering upon the discussion of this question, the appellants' counsel, with characteristic candor and fairness, concedes: 1. That there is no objection to a succession tax, as such, and that it is not a tax on the property of the estate already taxed; 2. That the right or privilege of receiving property upon the death of the former owner is so far different from other property or subjects of taxation that it may well be classed by itself; 3. That a classification which makes differences between descendants, collateral relatives, and strangers to the blood is founded in reason, and may be sustained; but he says that all who fall within any one class must be treated by the same rule, and, if they are not so treated, the law is discriminating and arbitrary, and under it not only is the provision requiring uniformity of taxation violated, but men do not stand equal before the law.

There are two ways in which it is said that this law discriminates between members of the same class: 1. No tax is to be collected unless the value of the whole estate transferred ²¹⁵ equals or exceeds ten thousand dollars, but, if it does exceed ten thousand dollars, then the tax is to be paid upon the whole property. Thus, while one collateral heir, who receives nine thousand nine hundred dollars from one estate, pays nothing, another, belonging to the same class, who receives just ten thousand dollars from another estate, is required to pay a tax upon his whole legacy. This is said not to be exemption, but unjust discrimination. 2. Suppose A and B die possessed of estates of the net value of nine thousand nine hundred dollars and ten

thousand one hundred dollars, respectively, and each having made a will bequeathing his property to collateral kindred in the same class; the man who receives two thousand dollars under A's will pays no tax, while the man who receives two thousand dollars under B's will is obliged to pay a tax, though each is of kin in the same degree to his respective testator, and hence belongs to the same class.

These contentions are met by the respondents by the proposition that only taxes levied upon property are required to be uniform; this is a tax upon a privilege granted by law—namely, the privilege of inheriting property or receiving the same by will; the privilege is not a natural right, but purely a privilege granted by law, and it may be modified or repealed at the will of the legislature, subject only to constitutional provisions.

The result of this doctrine, if logically carried out, seems to be that the legislature may take away the right of inheritance and the right of disposing of property by will entirely, and provide that, after payment of debts, all the property of a deceased person shall revert to the state, unless there is some direct constitutional provision preventing such a law. This is certainly a startling proposition. It seems to have been first formulated in the case of *Eyre v. Jacob*, 14 Gratt. 430, 73 Am. Dec. 367, where the court says: "The legislature might, if it saw proper, restrict the succession to a decedent's estate by devise or descent to a particular class of his kindred—say, to his lineal descendants or ascendants; it might impose terms or conditions upon which ²¹⁶ collateral relations may be permitted to take it; or it may to-morrow, if it please, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts, and the residue appropriated to public uses."

The language used was simply by way of argument. No such law was before the court, nor has such a law as the one supposed been before any court since that time, though the idea expressed by the Virginia court has been referred to several times by other courts: *Mager v. Grima*, 8 How. 490; *Magoun v. Illinois etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594; *State v. Hamlin*, 86 Me. 495, 41 Am. St. Rep. 569, 30 Atl. 76. When such a law presents itself to any court of last resort, it will deserve very serious consideration before it can be approved. We intimate no opinion upon the proposition—certainly no favorable opinion. It is enough for the purposes of the present case that it

be held, in accordance with the law as laid down by the great weight of authority, and as conceded by the appellants, that reasonable succession taxes are unobjectionable, provided no constitutional inhibition be violated.

Starting from this basis, and considering the question of the supposed unlawful discrimination or lack of uniformity in the provisions of the law, we find, in the first place, no direct adjudications upon the subject in our court. The cases of *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833, and *State v. Mann*, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, are cited as affecting in some degree the questions in the present case, but examination shows that neither of them has more than a remote bearing thereon. In the first case cited, it was held that, under the constitutional mandate as to taxation, the legislature may prescribe the property to be taxed, and prescribe the rule by which it is to be taxed, subject to the limitation that the rule must be uniform, and that it was competent for the legislature to place certain lands held in trust by the state for the railway company in a class, and exempt ²¹⁷ them from taxation for a term of years; that this was classification founded on rational grounds and was not arbitrary discrimination. It is uniformity of rule, and not uniformity of subjects, which the constitution requires. Subjects may be classified, and, if the classification be reasonable and founded on rational grounds, it will be sustained. In the second case cited, it was held that a law imposing a tax upon estates, regardless of their solvency, in counties having more than one hundred and fifty thousand population, was a special law for the assessment and collection of taxes, applicable only to Milwaukee county, and void under the constitutional provision that such laws shall be uniform in their operation throughout the state. It was said that the law in question was not a succession tax, because imposed on the whole estate, regardless of solvency; that a succession tax is essentially a tax on the transmission of property, and not, properly speaking, a tax upon the property transmitted; and the question whether a succession tax could lawfully be imposed under our constitution was expressly left undecided.

Thus the principle was recognized in the *Sanderson* case, which is universally laid down in the authorities—that a succession tax is a tax on the privilege of receiving property, and not a tax upon property. As said by the supreme court of the United States in *Magoun v. Illinois etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 591, concerning such taxes: “An inheritance

tax is not one on property, but on the succession. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.”

²¹⁸ It is really not a matter of great importance in this case to decide whether an inheritance tax is subject to the constitutional provision that the rule of taxation shall be uniform. Considering the clause without undue refinement of reasoning, it is difficult to see why it does not apply to an inheritance or succession tax. It is true such a tax is called an excise in the decisions. An excise is a duty levied on articles of sale or manufacture, upon licenses to pursue certain trades or deal in certain commodities, upon official privileges, etc.: *Cooley on Taxation*, 2d ed., 4. But when such duty is levied upon a trade, occupation, or privilege as a means of producing revenue alone, and not in exercise of the police power, it is, to all intents and purposes, an exercise of the taxing power, and no good reason is perceived why such taxation is not included within the taxation referred to in the constitution in the clause quoted. The argument against this position is that the words immediately following this clause, namely, “and taxes shall be levied upon such property as the legislature shall prescribe,” indicate that it is a taxation of property alone which the section covers. The history of the two clauses given by the present chief justice in the case of *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 37, 8 N. W. 833, perhaps affords some color to the idea that it is the taxation of property alone which is referred to by the section. We do not regard this question, however, as one of supreme importance in this case. Grant, if you please, that such taxation as the present be not included in the word “taxation” as used in the constitutional provision quoted; there is still the fourteenth amendment to the federal constitution to be considered; there is still the principle upon which every constitution in the Union is founded to be reckoned with, namely, the principle that all men are equal before the law, and that life, liberty, and property are secured to all alike. The emphatic protest against special privileges to any favored persons or class of persons may be found in varying terms in all of our constitutions.

Our ²¹⁹ fathers came here to escape the reign of privilege, and they made equality before the law the very cornerstone of their plan of government. In our own constitution it is thus expressed, in section 1, article 1: "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed."

This may be said to be somewhat vague and general—somewhat in the nature of a rhetorical flourish; but when it is said that all men equally free have the inherent rights of life, liberty, and the pursuit of happiness, it is certain that it is not meant that some have or may have greater privileges before the law than others. The phrase must mean equality before the law, if it means anything.

The idea is expressed more happily in the fourteenth amendment, where it is said that no state shall deny to any person within its jurisdiction the "equal protection of the law." A tax law which makes unjust discrimination—which taxes one person at one rate, and another one, within the same class and under like circumstances, at another rate, or exempts him altogether—denies the equal protection of the laws. This must be self-evident. There may indeed be classification; and if the classification be founded upon real differences, affording rational grounds for a distinction, such classification will not violate the rule of uniformity and equality. So, also, there may be exemption, but the exemption must be reasonable in amount, and founded, also, on rational grounds.

These, then are the vital questions in this case: 1. Is the exemption of all estates under ten thousand dollars in value reasonable? And 2. Is the attempted classification a legal and rational one? As to the exemption, we confess that, especially with regard to devisees or transfers to strangers and collaterals, it seems very large. It is much larger than is allowed by ²²⁰ most of the inheritance laws in other states. In New York, the exemption in such cases is only five hundred dollars, while in case of devisees or transfers to lineal descendants and other near relatives it is ten thousand dollars. In most of the other state laws where exemptions are allowed, they run from two hundred and fifty dollars to one thousand dollars, but in Massachusetts the exemption limit is fixed at ten thousand dollars, and in Montana at seven thousand five hundred. Both of these last-named laws have been sustained by the courts of last resort

in the states, respectively, in which they were enacted, and in both cases the question of exemption was raised and discussed: *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512; *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267. In Massachusetts, it is true, there was no constitutional provision of uniformity governing the tax, but in Montana there is a constitutional provision requiring a uniform rate of taxation. In both cases cited, the exemption was sustained on the ground that the cost of administration of small estates is proportionately larger than that of large estates, and that this operates to diminish the amounts received by beneficiaries, and that it appears that such laws have usually granted exemptions, and that the amount of exemption is peculiarly a subject for the exercise of legislative discretion. In our state the right to make reasonable exemptions in tax laws has always been recognized, and, of course, the legislature must be the first judge as to the proper amount thereof. No court will assume to say that the legislature is wrong in its judgment as to the amount, unless such error appears so clearly as to leave no reasonable doubt. So, while we would have been better pleased had the exemption been more nearly in accord with the general rates of exemption as fixed in other laws, we do not feel that we can say, in opposition to the judgment of the legislature, that the amount fixed is unreasonable.

Passing, then, to the question of classification, we reach really the crucial point of the case. We have endeavored to give this subject the most careful thought and investigation,²²¹ but we have been unable to convince ourselves that the attempted classification in this law answers the requirements of legal and constitutional classification. It is a trite expression that classification, in order to be legal, must be rational; it must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a difference of rule. It is well settled that there may justly be classification between lineal descendants, collateral relatives, and strangers; each may be made a class and a different rule applied, because there are real differences of situation and in the considerations applicable to the various classes. It has been decided, also, that a progressive law which levies one rate of tax on all receiving over ten thousand dollars and not exceeding twenty thousand dollars, and a higher rate on all receiving over twenty thousand dollars and not over fifty thousand dollars, and so on upward, is a valid law, and that such classification does not violate the rule of equality, because the

classes are proper classes, and all members of a given class are treated alike: *Magoun v. Illinois etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594.

This latter provision is not involved in the present case, as there is no such element in our law. But while classification is proper, there must always be uniformity within the class. If persons under the same circumstances and conditions are treated differently, there is arbitrary discrimination, and not classification.

It is claimed that such is the effect of the present law, and we can see no escape from the conclusion. People in the same class are subject to different rules, some being exempt and some being taxed. This results from the peculiar provisions of section 19 of the law, which defines "estate" and "property" as construed by the New York courts before we borrowed the law. As already pointed out, under this provision the ten thousand dollar limitation or exemption is based on the size of the whole property devised or granted, and not upon ²²² the amount received by each individual legatee or grantee. Thus it results that one collateral relative, receiving a legacy of two thousand dollars from one testator, whose estate amounts to but nine thousand five hundred dollars, pays no tax, while another collateral relative in the same degree receiving a legacy of two thousand dollars from another testator whose estate amounts to ten thousand five hundred dollars, is obliged to pay a tax. Here is unlawful discrimination, pure and simple. No rational distinction or difference can be drawn between the two legatees simply because the estates from which their legacies come are of slightly different size. They are both within the same class, surrounded by the same conditions, and receiving the same benefits. One pays a tax, and the other does not. This is not the equal protection of the laws.

We have reached this conclusion reluctantly. We should far rather have sustained the law, but the conclusion has been forced upon us. We agree with the general principles which have been approved by the overwhelming weight of authority in the courts of this country with reference to inheritance or succession tax laws. Those principles are, in brief, that such taxes are taxes upon the right to receive property, and not upon property itself; that classification between lineals and collateral relatives and strangers does not violate the rule of uniformity, nor the principle of the equal protection of the laws; and that reasonable exemption of small estates also may be allowed without

violating uniformity. We have been compelled to condemn the present law, notwithstanding the foregoing general conclusions in favor of the validity of such laws in general, because, under its peculiar provisions, unlawful discrimination necessarily results between beneficiaries in the same class.

We have not attempted to review the authorities in the various states, although the field is a broad and interesting one. Among the authorities which will be found to be of value in the consideration of the questions involved, the following may be named in addition to those already cited in this opinion: **223** Scholey v. Rew, 23 Wall. 331; United States v. Perkins, 163 U. S. 625, 16 Sup. Ct. Rep. 1073; Plummer v. Coler, 178 U. S. 115, 20 Sup. Ct. Rep. 829; Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321; State v. Alston, 94 Tenn. 674, 30 S. W. 750; In re Wilmerding's Estate, 117 Cal. 281, 49 Pac. 181; In re Stanford's Estate, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462; Union T. Co. v. Durfee, 125 Mich. 487, 84 N. W. Rep. 1101; State v. Henderson, 160 Mo. 190, 60 S. W. 1093; State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245; State v. Ferris, 53 Ohio St. 314, 41 N. E. 579; Curry v. Spencer, 61 N. H. 630, 60 Am. Rep. 337; Strode v. Commonwealth, 52 Pa. St. 181; State v. Dalrymple, 70 Md. 294, 17 Atl. 82; Cope's Estate, 191 Pa. St. 1, 71 Am. St. Rep. 749, 43 Atl. 79.

The view we have taken of the constitutional question involved renders unnecessary the consideration of any other questions in the case.

By the Court. Judgment reversed, and action remanded to the circuit court of Milwaukee county, with directions to that court to reverse the judgment of the county court and render judgment in accordance with this opinion.

CASSODAY, C. J. I fully concur in the opinion of my brother Winslow in this case. I add this note merely to avoid any misapprehension as to my relation to the case. Several months ago I had occasion to pay a small inheritance tax under the legislative enactment in question. I made such payment voluntarily and without any protest, and with no expectation that the same would be paid back—without regard to the question whether the act was void or valid. I neither make nor have any claim for such repayment. Such being the facts, I participated in the hearing and the decision of the case.

Justice Marshall joined in the conclusion reached by his associates, but was of the opinion that the court ought to have declared

a doubt as to whether there was unlimited legislative authority "to appropriate to public ownership a proportion or the whole of a person's possessions upon the occasion of his death," and upon this subject for himself said:

"My conclusions are that the species of legislation under discussion cannot be justified upon the ground that there is no natural right whatever to transmit property by inheritance; that the ownership of property does not in any sense rest on a conditional bestowal thereof in the first instance by sovereign authority, subject to sovereign resumption of ownership upon the death of the owner thereof if the sovereign so wills; that a succeeding private owner of property by inheritance does not come to the possession of the same in any sense as a beneficiary of a sovereign head. The absolute title of the constitution must necessarily be considered, I think, as a title by right absolute, as absolute as any right which is subject, as all are, to reasonable regulations, or having, as incidental thereto, not the mere privilege, but the right in some way to have the property pass to a private successor in case of the death of the owner and the right of kindred to have it so pass. We repeat what has been said: that is one of the prime essentials of the pursuit of happiness declared in the constitution to be an inherent possession of all men. Who could define the constitutional meaning of that term and leave out any of those things universally supposed to be necessary accompaniments of civilized society? The social instinct suggests at once that it must include, as incidental to the right to dwell together in the family relation, the right, not only to acquire and enjoy property in the physical sense, but to have the mental enjoyment of transmitting it to others in the family relation under such reasonable regulations as legislative wisdom may see fit to impose. A legislative appropriation, as by sovereign proprietary right upon the death of the owner thereof, is a clear invasion of the spirit of the constitution, and it is inconsistent with all our notions of constitutional liberty. That does not militate at all against the power to reach and tax the right to take property by inheritance or to take the same as devisee or legatee. The taxing power as to such property rights, the same as any other, is so firmly established on principle and authority, and reasonable legislative efforts to that end are so praiseworthy, that no one will venture to question the right itself. It needs no support now, if it ever did, by the idea that there is a constitutional right, vested in sovereign authority, to confiscate property upon the death of the owner—that death can make that which was before private property public property."

Collateral Inheritance Tax Laws are considered in the monographic note to *State v. Hamlin*, 41 Am. St. Rep. 580-585. A succession tax must be uniform as to persons of the same class. One cannot be charged a greater percentage on his legacy than another of the same class because his legacy is larger: *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653, 45 S. W. 245. And a statute imposing such

a tax in certain cases only is unconstitutional: *Estate of Cope*, 191 Pa. St. 1, 71 Am. St. Rep. 749, 43 Atl. 79. An inheritance tax law, excluding from its operation real property and laying the tax upon inheritances of personality, exempting those whose property is exempt from taxation, allowing a larger exemption to lineal than to collateral heirs, and not taxing the excess of property received above a uniform exempted sum, is unconstitutional: *Drew v. Tift*, 79 Minn. 175, 79 Am. St. Rep. 446, 81 N. W. 839. See, further, *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 508, 60 N. E. 439; *Estate of Mahoney*, 133 Cal. 180, 85 Am. St. Rep. 155, 65 Pac. 389.

NORTHERN TRUST COMPANY v. SNYDER.

[113 Wis. 516, 89 N. W. 460.]

CORPORATIONS, Member of, When may Enforce Cause of Action in Favor of.—A member of a corporation cannot enforce a cause of action in its favor, unless it appears (1) that those whose duty it is to act have, after request, refused to do so, or (2) that they are so concerned in the wrong sought to be redressed and hostile to any attempts to vindicate the corporate rights that it is reasonably certain that a request to proceed would be unavailing. (p. 871.)

COUNTY, TAXPAYERS, When may Sue to Enforce a Demand in Favor of.—A taxpayer may sue in his own behalf and in behalf of all other persons similarly situated, to restrain the county from paying certain illegal sheriff's bills, and to obtain an accounting of moneys paid to the sheriff, to which he was not entitled, when it appears that the county officers whose duty it is to maintain such a suit were the same officers who, for a long time, had been accustomed to audit and order paid the class of bills in question, and had been advised and believed that they were legal, and hence that they could not act without impeaching their own transactions. (pp. 871, 872.)

TAXPAYERS, Right of, to Sue to Restrain Unlawful Payment of Public Moneys.—A suit to restrain officers of a county from transcending their powers and violating the organic act of the corporate body by paying out moneys to a sheriff on illegal demands may be maintained by a taxpayer suing on behalf of himself and others similarly situated without first requesting such officers to institute such suit. (p. 872.)

LACHES, When Will not Bar Suit.—A suit by a taxpayer to restrain the payment to a sheriff of illegal bills against the county, and for an accounting for moneys before paid upon similar bills, is not barred by laches unless there have been (1) knowledge on the part of the plaintiff of the course of dealing with the sheriff, indicating acquiescence; (2) performance of the services by the sheriff for which the alleged illegal charges were made, when he would, within reasonable probability, have omitted to do the work had he supposed in advance, or had any reasonable ground to suppose, that his right to compensation would be challenged; and (3) benefit to the corporation reasonably commensurate with the charges for the services performed. (p. 873.)

PAROL EVIDENCE is not Admissible to Prove what the Members of a Legislative Body Meant or Intended by any of its resolves or by-laws. (p. 875.)

THE RECORDS OF A COUNTY BOARD Cannot be Supplemented by Parol Evidence of its Members to show what they intended by any of its enactments. (p. 875.)

COUNTY BOARDS, Power to Change Back to an Abandoned Method.—A statute authorizing a county board by a resolution to be entered on its records to change the method prescribed by law for compensating a sheriff for all services performed within the county for which it is legal to pay, and declaring that when the resolution has been adopted, the board must, at the annual meeting preceding the election of county officers, fix the salary of the sheriff in the same manner as the amount of the salaries payable to other officers are required to be fixed, does not empower such board, after a change from fees to salaries, to return to the fee system. (p. 876.)

COUNTY, CLAIMS AGAINST, Allowance of, When Void.—If a statute provides the manner in which claims of statements against a county must be made out, and that no claim shall be acted upon or considered by any county board unless such statement shall have been made and filed, an allowance of a claim not made out as prescribed by the statute is such a disregard of the legislative will as to give any person interested a legitimate ground of complaint. (p. 879.)

PUBLIC OFFICER, Compensating for Service Rendered Outside the State.—Manifestly a sheriff cannot perform any official duty outside of the state, and hence cannot recover for services rendered or expenses incurred beyond the state in the pursuit or arrest of criminals, in the absence of some statute expressly authorizing such recovery. (p. 880.)

COUNTY, Power of, to Pay for Services Rendered Beyond the State.—A statute enumerating among the general powers of the county board the levy of taxes and the raising of such moneys as may be necessary to defray the charges and expenses incident to, or arising from, the execution of their lawful authority and of representing the county, and having the care of the county property and the management of the business and concerns of the county in all cases where no other provision shall be made, does not give such board power to authorize the payment of money for expenses incurred or services rendered outside of the state in the pursuit or arrest of criminals. (pp. 881, 882.)

PUBLIC OFFICERS, Claim of, Founded on Mistake of Law.—The fact that a custom had existed to allow a sheriff for moneys expended and services rendered outside of the state in the pursuit and arrest of criminals, and that he believed that such allowance might lawfully be made, cannot confer on the courts any power to save him harmless from his mistake, or to excuse him from accounting for moneys paid him for such expenses and services without authority of law. (pp. 885, 886.)

SHERIFF—Compensation for Unsuccessful Pursuit of Criminals.—A statute allowing an officer "compensation for travel to serve a criminal warrant" does not entitle him to any compensation when his services are not successful, or, in other words, where he does not succeed in serving his warrant by making an arrest. (p. 887.)

PUBLIC OFFICER, Fees of, When Controlled by Fees for Similar Services—Where a fee is prescribed for a particular service, and the duty is imposed to perform another service of a similar character for which compensation is allowed, but for which no rate is expressly fixed, the fee specified for such particular service should be regarded as the legislative measure to be followed in similar

matters, in the absence of some special circumstance indicating that it was not intended to be such guide. (p. 888.)

PUBLIC OFFICER'S COMPENSATION, Fixing of, After Services are Rendered.—Though a statute clearly contemplates that the compensation of an officer for his services shall be fixed in advance of their rendition, still, if not so fixed, the officer has a legitimate claim which may be subsequently adjusted and paid. (p. 889.)

PUBLIC OFFICERS, Revising Allowances to.—Where it appears that the county board, in making allowances to a sheriff, acted on a wrong basis, the court must correct such action by making the allowance on the basis prescribed by law. (p. 887.)

DAY, COMPENSATION BY.—A "day" means a calendar day in all cases where the statute merely provides for compensation at a certain or reasonable sum per day. Neither a county board nor the courts have any right to call the work done in a calendar day any more than a day's work or service, in the absence of some statute expressly authorizing it. (p. 890.)

PUBLIC OFFICERS, Compensation not Authorized by Law.—If a statute provides that a sheriff shall not be allowed for the services of an assistant unless the magistrate making the commitment certifies to the necessity for his assistance, the court cannot authorize such allowance on the ground that assistance was, in fact, necessary. (p. 891.)

SHERIFF, Effect of Erroneously Acting on the Advice of the District Attorney.—The district attorney has no right to direct a sheriff to go beyond the jurisdiction of the state or to do anything not required by law, and the fact that a sheriff acted under the mistaken advice of the district attorney cannot entitle him to compensation from the county. (pp. 892, 893.)

Suit by a taxpayer of Douglas county on behalf of himself and others similarly situated to enjoin the county from paying certain sheriff's fees already audited by the county board, and to obtain an accounting as to moneys already paid to the sheriff to which he was not entitled, and to recover the same for the county. By agreement entered into at the commencement of the trial, the evidence of the details of the bills was omitted until a decision could be had as to whether any of them, whether paid or unpaid, were illegal, and that if any were found to be illegal, evidence should then be taken to enable the court to properly state the account with the county and the sheriff. In 1895, the county board, by resolution, changed the method of compensating its sheriff, except for keeping its prisoners, from the fee to the salary system, and before the time of fixing the salaries of county officers to be elected in 1898, the board resolved that the sheriff to be elected "should receive no salary, or allowance by way of salary, or otherwise from Douglas county," but no other means were taken to change the system of compensation from the salary back to the fee system. The defendant was afterward elected sheriff for the county, and

served a whole term, and bills in his favor for services and expenses were allowed by the county board aggregating fifty-two thousand eight hundred and eighty dollars and forty cents, about forty per cent of which remained unpaid. He supposed, when elected and during his term, that the action taken by the board in 1897 had restored the fee system of compensation. Among the paid and unpaid bills were many charges of one dollar and fifty cents per case for attending the municipal court with prisoners, the attendance in each case not exceeding one-half a day; charges for pursuing criminals outside of the state; for assistants in taking prisoners to the state prison, where there was no certificate by the proper officer of any necessity therefor; expenses of telegrams sent and received in effecting the apprehension of offenders; for raiding public gambling-houses without making arrests; for assistance in quelling a riot; for time of two officers in taking persons to the workhouse where but one was employed; for services and expenses in assisting the coroner to investigate the cause of death in certain cases, and pursuing and apprehending the person supposed to be guilty of causing the death, no warrant or order of court having been obtained to authorize such pursuit and arrest. Parol evidence was received, against the objection of counsel for plaintiff, from which the court concluded that the county board had intended by its resolution passed in 1898 to restore the fee system, and that it had been the practice for some ten years to run the sheriff's office in the same manner as the respondent had run it so far as regarded pursuing, outside of the state, persons accused of criminal offenses committed within the county. The trial court determined that the plaintiff had no cause of action, and directed the complaint to be dismissed with costs, and that judgment be entered against the plaintiff; and from such judgment he appealed.

George P. Knowles and Sanborn, Luse, Powell & de Forest, for the appellant.

Catlin, Butler & Lyons and Burr W. Jones, for the respondent.

524 MARSHALL, J. The ground upon which a member of a corporation is permitted to invoke the jurisdiction of equity to enforce a cause of action in favor of the latter is that he has an interest in the corporate affairs needing protection, which cannot be protected otherwise than by an enforcement of the

cause of action of the corporation, and that such enforcement cannot be had, and justice will entirely fail, if he is not permitted to stand for those persons having the primary ⁵²⁵ right to act. In order that the situation in that regard may be complete to the satisfaction of equity, it is necessary to show that such persons will not perform their duty. That may be done in either of two ways: By showing that they have neglected or refused to proceed after being requested so to do by some person or persons whose requests in that regard should be honored; or by showing, expressly or by necessary inference, that they are so concerned in the wrong to be redressed, and hostile to any vindication or attempt to vindicate the corporate rights, that it is reasonably certain that a request to them to proceed to that end by judicial remedies would be unavailing. Observations may be found in some legal opinions tending to convey the idea that a demand upon the proper corporate officers to enforce a corporate right of action, and their refusal so to do, regardless of circumstances, is a condition precedent to the right of a member of a corporation to stand in their place and do their duty. Such is not the law. If it appears, reasonably, by all the allegations of the complaint, in a suit instituted by a member of a corporation in its right, that those persons in whom the duty and the primary right rests to represent it will not perform that duty, from any cause, a case is thereby presented, subject to proof, entitling an interested person, such as a taxpayer in case of a municipal or political corporation, to protect his right and that of all others similarly situated, by suing in his and their behalf, and presenting to a court for adjudication the cause of action of the corporation: *Dod v. Wisconsin etc. Ry. Co.*, 65 Wis. 108, 56 Am. Rep. 620, 25 N. W. 533; *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81; *Cunningham v. Wechselberg*, 105 Wis. 359, 81 N. W. 414; *Land etc. Lumber Co. v. McIntyre*, 100 Wis. 245, 69 Am. St. Rep. 915, 75 N. W. 964; *Egaard v. Dahlke*, 109 Wis. 366, 85 N. W. 369. The complaint in this case, and the proofs as well, fully satisfy that test. It is alleged and proved that the county board of Douglas county, for a long period of time prior to the commencement of this action, had been accustomed to audit and order paid, sheriff's ⁵²⁶ bills for large amounts, covering almost all branches of his official labor, that were not legally chargeable against the county; that their practice in that regard, and to a considerable extent that of their predecessors in office, had been approved by their legal adviser, and that they believed the same to be legal.

Any attempt to recover back money illegally paid, therefore, upon his illegal claims, or to prevent such payment, involved a charge against the members of the board of having wrongfully, either through ignorance or something worse, caused the county revenues to be dissipated. The case made shows that if the sheriff be guilty of obtaining money on illegal bills, the members of the board are guilty participants in the wrong. That they would turn against themselves, impeaching their own transactions, confessing that they had misused their positions and squandered the revenues of the county to the amount of many thousands of dollars, even though they were not guilty of any bad faith in the matter, would have been an exhibition of moral heroism in office not reasonably to be expected. Therefore, there were but two courses for taxpayers to pursue: Submit to the wrong, or invoke the aid of the court in this form of action for redress.

The rule above discussed is not deemed controlling, necessarily, in this case, for the following reason: It applies only when the primary right involved is the right of the corporation, which it might and ought to enforce. It does not concern the action of a member of a corporation to protect his own interests which are of a primary nature. The distinction must not be lost sight of, between where the right of a member of a corporation is primary, such as that to prevent the unlawful expenditure of corporate funds, and where it is secondary, as that to recover for the benefit of the corporation, money unlawfully expended. Every member of the corporate body, in the first situation suggested, is primarily interested in having the corporate officers prevented ⁵²⁷ from transcending their powers or violating the organic act of the corporate body in any way: Pomeroy's Equity Jurisprudence, sec. 1093. There is obviously no way of enforcing that right except by a resort to equity, and its doors are always open to any proper case of that kind. The relief sought in such cases is preventive, but any other relief is obtainable which may be necessary, in the given case, to do complete justice in the matter. To that end relief may be given which is appropriate to a state of facts which, of themselves, would be a proper subject for an independent suit by the corporation, or suit in its right by a member thereof, if such facts can be reasonably considered so far germane to the main cause of action as to be deemed a part of it: Pomeroy's Equity Jurisprudence, sec. 1093. Such is the situation here. The main cause of action was to put an end to a course of allowing illegal

sheriff's charges that had been in vogue in Douglas county for a long time, and to enjoin the county from paying a large amount of such charges that had been allowed and were about to be discharged by the issuance of county orders and the payment thereof. That necessarily brought before the court the transactions in regard to the actual disbursement of money upon illegal bills, to the end that any legitimate indebtedness, found due on unpaid bills, might be discharged in whole or in part by money already received by the sheriff, to which he was not entitled, and, incidentally, to restore to the county treasury any excess of money illegally paid to him, over and above the legal part of such unpaid bills. All of the matters brought to the attention of the court were either directly or indirectly involved in the cause of action for preventive relief. That rendered unnecessary any showing of compliance with the rule first discussed as a condition precedent to the maintenance of the suit: *Frederick v. Douglas Co.*, 96 Wis. 411, 425, 71 N. W. 798.

The claim is made that plaintiff's right of action is barred by laches under the rule applied in the *Frederick* case. Three ⁵²⁸ things, at least, are essential to the maintenance of that claim: 1. Knowledge on the part of the plaintiff of the course of dealing with the sheriff, indicating acquiescence therein; 2. Performance of the services by the sheriff, for which the alleged illegal charges were made, when he might and within reasonable probability would have omitted to do the work if he had supposed in advance, or had any reasonable ground to suppose, that his right to compensation therefor would be challenged; 3. Benefit to the corporation reasonably commensurate with the charges for the services performed. All those matters were deemed material in the case upon which counsel rely, as will be readily seen by a study thereof. It is a mistake to suppose that the court there refused to grant restorative relief to the taxpayers merely because of their acquiescence in the payment of the money for a considerable length of time, with knowledge of the facts. It was grounded largely upon the fact that performance of the service was beneficial to the county in respect to its corporate duties. There was no question but that the taxpayers had kept silent while the expenses were being incurred and money paid out in discharge thereof, with knowledge of the facts, but that the services were rendered in good faith, were worth to the county, in promoting its corporate interests, the amount charged therefor, and that the person rendering them might have desisted from his labor at any time

had he supposed that his right to be paid therefor would be challenged by a taxpayer. The claim of the respondent sheriff will not stand the test of that case at any material point. All of his claims which were, in any view, legally chargeable to the county, were for services that he was bound to render in the efficient performance of his official duty. He had no choice in the matter. Whether taxpayers objected to his claims for compensation or not, we must presume that he would have performed his official duties, efficiently, just the same and taken his ⁵²⁹ chances on obtaining such compensation as was legally incident to his office. As to claims for which the county was not liable in any event, because not rendered in the performance of any duty to the county or to the state, for which the county was liable, the rule of the Frederick case does not apply, because the county did not receive any benefit therefrom, whatever. Furthermore, so far as relates to the services covered by the salary of fifteen hundred dollars per year, if the sheriff was entitled to that instead of fees for services rendered in his county, other than boarding prisoners at the county jail, there is no finding that plaintiff knew or had reasonable ground to believe, till most of the mischief complained of was done, that the law was being violated by paying fees instead of a salary. So no ground is suggested in the Frederick case, nor otherwise by counsel for respondents, for holding that plaintiff is estopped by laches from prosecuting this suit. Granted that the sheriff acted in good faith from first to last, granted that he acted under the advice of the district attorney, and that the county board, in allowing bills which were illegal, were free from any thought of intending to wrong their corporation, so far as his bills are for the performance of duties which his office required him to perform, and for which he was entitled to pay either by salary or otherwise from the county, he did no more and no less than he would have done regardless of the attitude of plaintiff or any other taxpayer as regards his compensation. So far as his bills are for the performance of duties which he was not required by law to perform officially, the county received no benefit.

One of the most important questions for solution is whether the county board, having once regularly adopted the salary system, for compensating the sheriff for services rendered in the county, for which it was liable to him, other than boarding prisoners in the county jail, possessed power ⁵³⁰ to re-

turn their county to the fee system. The records of the county board do not definitely show that there was any attempt to fully restore such system. On the trial an attempt was made, with the approval of the court, to supplement the records of the board by parol evidence of its members as to what they intended in regard to the matter. We need spend but little time to show that the consideration of such evidence was manifestly wrong. It is too elementary to justify us in referring to authority on the question, that a legislative body is not permitted under any circumstances to declare what its intention was on a former occasion so as to affect past transactions. When it is permissible for such a body to construe one of its enactments at all, it is under such circumstances that its action may reasonably be considered either as the making of a new law or the change of an old one. Its members have no more right to construe one of its enactments retroactively than has any private individual: *Bingham v. Winona Co.*, 8 Minn. 441. If all the members acting together cannot do that, certainly individual members cannot. But, as before indicated, the rule in that regard is too elementary to reasonably admit of discussion. So we must put aside the parol evidence, without which, it is fair to presume from the trial court's findings, the conclusion would not have been reached that the purpose of the resolution passed by the county board, declaring merely that the next sheriff should not have a salary, was to rescind in toto the proceeding had in 1895 adopting the salary system. The resolution, like all resolves, laws, by-laws and ordinances of a legislative body, must speak for itself, in the light of those things that may be legitimately resorted to, to aid in its construction, which by no means includes parol evidence, of the members of the body concerned in its adoption, as to what they intended thereby.

There would be much difficulty in coming to the conclusion from the resolution of 1898 itself, that the purpose ⁵³¹ thereof was to rescind, more than temporarily, the action of the board in adopting the salary system in 1895, but as it is not necessary to definitely decide that question, we will leave it, assuming, for the purposes of this case, that the resolution might possibly have the construction contended for by counsel for respondent, independent of the parol evidence upon which the learned trial court seems to have relied.

It must be conceded that the county board has no general power of legislation. It possesses such powers of legislation

in purely local matters as are delegated to it by the supreme legislative power. If we cannot find a delegation of power to it to restore the fee system for compensating its sheriff, after once having changed to the salary system pursuant to what is now section 694a of the Statutes of 1898, then it must be, and is, conceded by the learned counsel for respondent, as we understand them, that it does not exist. The general method of compensating sheriffs for services rendered for their counties, or for which such counties are liable, is by fees, but it is provided: "Any county board may, at an annual or other meeting, by a resolution to be entered on their records, change the method prescribed by law for compensating the sheriff for all services performed by him within the county, for which the county is liable to pay. When such a resolution shall have been adopted, it shall be the duty of such board, at their annual meeting preceding the election of county officers, to fix a salary for the sheriff in the same manner as the amount of the salaries payable to other county officers are required to be fixed."

It is very difficult, if not impossible, reasonably, to discover in that language any attempt to confer authority upon the board to change back to the method "prescribed by law," considering that term to refer to the general method which has been in vogue in the state ever since its organization, antedating more than thirty years the law permitting the salary system. The only way it is claimed we can read out ⁵³² of the law the power we are in search of is to consider such term as pointing to the particular method of compensating the sheriff in any particular county, regardless of whether it is presently under the fee or the salary system. That is, that as to any county at any time, its method of compensating its sheriff, whether wholly or partly by the fee system, is, as to such county, the method "prescribed by law." That construction is not permissible, as it would render material parts of the law clearly inconsistent with each other. The only change which the law authorizes is one which, when made, is to be followed by action fixing a salary for the sheriff's office. Manifestly, to fix a salary, after the salary system shall have been abolished, would be an absurdity. By a familiar rule, a law is never to be so construed as to lead to that result, if any reasonable construction can be discovered that will avoid it. The words "prescribed by law" evidently refer to the system in vogue when section 694a was adopted. That was the fee

system. A change from that system is the only one that needs to be followed by the fixing of a salary. By reading the words, "change the method prescribed by law," change from the fee system, or abolish the fee system, the legislative purpose becomes perfectly plain, if it is not without such reading. Such reading, it seems, is manifestly according to the legislative intent. In no other way can the part requiring the fixing of a salary be harmonized with the preceding part authorizing a change in the method "prescribed by law."

It is suggested that power to change from the salary to the fee system may be implied from the power to change from the fee to the salary system. On that reference is made to decisions holding that a county board or other legislative body may repeal resolutions as well as adopt them, and that it may repeal one long after its adoption. *Mead v. Nelson*, 52 Wis. 402, 8 N. W. 895, is a sample of the authorities relied on by counsel for respondent. The action which the court there ⁵³³ had under discussion was a resolution directing the county clerk to take a tax deed to the county on tax certificates owned by it. Manifestly, whether a county shall or shall not take a tax deed upon its tax certificates is a matter within its general powers of local control. When the court said that a county board may pass a resolution and subsequently rescind it, it was talking about resolutions which concern matters that are under the general control of the board, matters that are within its general powers of local legislation. Not so the manner in which a sheriff shall be compensated. That is fixed by the general law of the state for all counties, with an option applicable thereto, by which they may, severally, substitute the salary system for the fee system, but with no option to substitute the fee system for the salary system. The act enabling counties to abolish the old way of compensating sheriffs—in other words, to change from the system "prescribed by law"—seems to be like any ordinary option law, giving to municipalities the power, severally, to say when it shall take effect therein. The power to adopt is a special, limited power, which, when once executed, is exhausted. We venture to say that no authority can be produced to support the contention that power to give effect to an option law carries with it, by implication, power to abolish it. In every instance, so far as we can discover, where the law-making power, in enacting an option law, has intended to give both the power of adoption and rescission, both powers have been expressly given. Coun-

sel for appellant suggest one such instance in our statutes, and there are others. The people of a town are authorized to change from the school district system to the township system, and to subsequently change back if they so desire: Stats. 1898, sec. 552. The primary system for supporting the poor was what was known as the township system, and the statutes provide a method by which any county can change to the county system, and also a method whereby it can subsequently ⁵³⁴ change back to the township system: Stats. 1898, secs. 1517, 1525. In our view, the legislative idea in the law in question was, as contended by counsel for appellant, to make the office of sheriff, to a limited extent, a salaried office, leaving it to the counties, severally, to put the law in force at the pleasure of their county boards, and that the county board of Douglas county, having put it in force in that county, cannot rescind it and change back to the old system, the one "prescribed by law," as the term is used in the later enactment, without an appropriate grant of power from the supreme legislative authority so to do.

Complaint is made that the board acted without jurisdiction in allowing claims in some cases because they were not presented in the form prescribed by section 667 of the Statutes of 1898. The statute covering the subject, prior to 1889, provided that "no account shall be allowed by the county board" unless made out in the particular manner specified: Rev. Stats. 1858, c. 13, sec. 37; Rev. Stats. 1878, sec. 677. Then, as indicated in the notes to section 677 of the Statutes of 1898, it was held that the law was directory, jurisdiction being referable wholly to what is now subdivision 2, section 669, wherein it is provided that the board shall have power "to examine and settle all accounts of the receipts and expenses of the county, and to examine, settle and allow all accounts, demands or causes of action against such county; and when so settled may issue county orders therefor as provided by law." The first decision of the court on the subject is in *Parker v. Supervisors of Grant Co.*, 1 Wis. 414. It was there left undecided as to whether it would be an abuse of power for a county board to allow a claim not made out and presented in conformity to the statutes. Particular attention was called to the wording of the statute, in that it did not prohibit the board from considering a claim if not made out as specified, and that the requirement that the claim shall be verified was clearly directory, by the very language of the

statute. The court does not seem to ⁵³⁵ have easily reached that conclusion. It was difficult, manifestly, to avoid giving effect to the mandatory language of the statute, in its very literal sense, prohibiting the board from allowing a claim unless made out in conformity with law. Nevertheless, the decision was followed and became as much the law of the state as if read into the statute. It so remained until the statute was changed, and is the law still unless such change renders the decision inapplicable. In 1889; as before indicated, the legislature dealt with the subject anew, and seems *ex industria* to have endeavored to give effect to the statute according to its letter, leaving no reasonable ground for the courts to deal with the matter by judicial construction. The prohibitory clause was taken from the first part of the section and put at the end of that part specifying the manner in which claims shall be made out and presented, and was expanded so as to prohibit the consideration as well as the allowance of any claim until properly made out, and so as to otherwise make it definite and certain, the following words being used: "And no such claim against any county shall be acted upon or considered by any county board unless such statement shall have been so made and filed."

It seems that there can be no mistaking the legislative purpose in making that radical change in the statute. The clause must now be read as a proviso to the general grant of power contained in subdivision 2, section 669, to the effect that the county board has power, as therein declared, to adjust and settle claims against the county, such as are specified in sections 676 and 677 of the Statutes of 1898, when itemized and verified as therein specified, and not otherwise. As the law now stands, if compliance with section 677, as to the manner of presenting claims, is not to be considered jurisdictional, for a county board to ignore it would be such a gross abuse of power, such a disregard of the clearly expressed legislative will, as to give any person interested a legitimate ground of complaint. ⁵³⁶ The wisdom of the law is plain. It aims at fencing a county board about so that individual members of the community, who bear the burden of taxation to meet county expenditures, may know with some reasonable degree of definiteness the basis for such expenditures, and whether they are legitimate or not. It is designed to protect the board from importunities to pass upon claims before they are presented in such a way as to be considered intelligently, to enable

it to easily eliminate improper charges from claims, and to enable taxpayers to detect abuses in the allowance of claims. The conclusion here reached goes somewhat further than was necessary in *Miller v. Crawford Co.*, 106 Wis. 210, 82 N. W. 175, but follows naturally from the reasoning of the opinion in that case.

A considerable portion of the disputed charges of the sheriff, both as to paid and unpaid bills, is for services and expenses rendered outside the state in the pursuit, arrest and return to Douglas county of persons accused of crime and triable there, and in obtaining witnesses from outside the state. In some cases the pursuit was successful and in some it was not. It is conceded by counsel for respondent that claims for such services and expenses were not chargeable to the county unless there is authority therefor, express or implied, in the statutes, and that there is no statute expressly authorizing the same. Manifestly, a sheriff cannot perform any official duty outside the state. The statutory regulation of his compensation refers wholly to services which he may render officially. True, if it is a corporate duty of a county to apprehend persons accused of crime and bring them to justice, and there is no way provided by statute for the performance of that duty except by employing some one to render services to that end and by incurring expenses such as those under discussion, the employment of the sheriff to render such services, at a reasonable compensation for time and expenses, would be an appropriate method ⁵³⁷ of performing such duty, and power to do so would probably, under the circumstances, by reasonable if not necessary inference, be implied from the existence of the duty itself. Counsel for respondent rely on that to sustain the class of claims under consideration.

The general powers of the county as a corporation are vested in its county board, and are definitely enumerated in section 669 of the Statutes of 1898. The particular subdivisions of such section to which our attention is called as containing, by implication, power to apprehend and bring to justice persons accused of crime, are numbers 5 and 6. The first of such subdivisions empowers the board to levy the taxes prescribed by law and direct the raising of such sums of money as may be necessary to defray all the charges and expenses incident to or arising from the execution of their lawful authority. The second of such subdivisions gives the board general power "to represent the county, and to have the care of the county prop-

erty and the management of the business and concerns of the county in all cases where no other provision shall be made." It seems clear that neither of those subdivisions imposes upon the county any duty requiring the incurring of expense other than such as may be incident to business of a civil nature and the collection of the public revenues. They simply clothe the county board with power to represent the county in the performance of its corporate duties elsewhere definitely outlined, and to direct the raising of sufficient money by taxation to pay all expenses incident thereto, and to levy other taxes as an agency of the state. No duty is elsewhere, in the statute, suggested, of the nature here under discussion. It cannot be found in the provisions referred to, unless it be by a construction not warranted, by any language used, or the general system of county government, or by the current of authority on the subject. That such public duty does not devolve upon a county or town by mere construction has been too often ⁵³⁸ decided to be now open to question. The learned counsel for respondent have not been able to cite us to any authority to sustain their view, except a single case, to which we will refer at some length later, and we have not been any more successful in our search to that end. The administration of the criminal law is solely a state affair. Every officer concerned in it, regardless of where the law permits or requires him to resort for his compensation, represents the sovereign power of the state in such matters, and is directly responsible to it for the faithful performance of his duty. A county is not a municipal corporation. It has no police powers. It is not a corporation in the strict sense of the term, but is what is denominated a quasi corporation, an organization in the nature of a corporation, exercising special and limited powers. Those powers pertain strictly to local concerns, the performance of local public duties in which no other part of the state is directly concerned. The apprehension and trial of persons accused of crime is a matter not of local, but of general, concern, one in which the people of the whole state, in theory, are equally interested. If a person commits the crime of larceny, he no more commits the offense against the particular political subdivision in which the offense occurs than against the person whose property he unlawfully takes. It would be as reasonable to say that the offense is against the school district, if committed within the territory of a school

district, as against the county, if committed within the territory of a county. The offense is against the state, and it is solely the business of the state to bring the offender to justice, such business to be conducted in such manner as the legislature may see fit to provide. That body has adopted a system of laws as complete as in its wisdom is necessary to that end, and county organizations are no part thereof except in so far as they are required, as mere agencies of the state, to bear ⁵³⁹ the burdens of taxation, and to pay the expenses of administering the law.

A brief reference to the authorities will be sufficient to demonstrate the correctness of the foregoing. In *Gale v. South Berwick*, 51 Me. 174, the power of a town, under a general legislative grant of power for local government quite similar to that given to county boards in this state, was invoked to justify incurring expense by way of paying a reward for the apprehension of a person accused of having committed the offense of murder within its boundaries. The case turned on whether the apprehension of persons accused of crime was a town duty in any sense unless created by special legislative enactment, and the court said: "The power given by statute to a town to raise money for 'necessary charges' extends only to those which are incident to the discharge of corporate duties. It is no part of the duty of a town to take charge of or supervise the criminal proceedings which may be instituted in behalf of the state, unless when such duty is specifically imposed. Towns are under no legal obligation to aid in the detection or conviction of offenders. The enforcement of the criminal law is intrusted to its appropriate officers"; and further, that no power is given to towns to raise money for the detection or conviction of offenders by any statute of that state, and none exists by implication. In *Grant Co. Commrs. v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174, speaking on the same subject, the court said: "The board of commissioners of a county is a creature of the statute, and is vested with and possessed of just such powers . . . as the statute has conferred upon it, and such as are clearly and necessarily implied, to enable it to carry out and accomplish the objects and purposes of its creation. The law confers no power, and enjoins no duty, upon the board of commissioners of a county to aid in the arrest, prosecution or conviction of a person charged with the commission of crime."

⁵⁴⁰ The same court, in *Hight v. Monroe Co. Commrs.* 68 Ind. 575, held that a county, as such, has no duty whatever to

participate in the execution of the criminal laws of the state, and that a contract obligating the county to pay for services in that regard is ultra vires; that the general law of the state provides the method by which its laws for the prevention and punishment of crime shall be enforced and of paying the expenses thereof. The power of county boards in the state of Iowa is substantially the same as in this state, and in *Hawk v. Marion Co.*, 48 Iowa, 472, in speaking of whether such statutes confer power or duty to aid directly in the administration of the criminal laws of the state, the court decided that no such duty was imposed upon counties, either expressly or by necessary implication; that no duty rests upon counties, as such, to pursue, arrest and bring to justice persons charged with crime; that the only manner of procuring money to pay the expenses of the arrest, trial and conviction of offenders is by taxation, and that the people of one county, as distinguished from the people of another, have no such special interest therein as will authorize the levy of taxes to pay the expenses thereof, except as the duty to impose taxes for that purpose is created by statute. We have a statute (Stats. 1898, sec. 725a), authorizing the sheriff, with the consent of the county board, or, under certain circumstances, of the chairman thereof, to offer a reward for the apprehension or conviction of the perpetrator of a felony. Such power, manifestly, would not exist unless specially granted, and in the section referred to it will be seen with what care such grants of power are made. It is there expressly provided that no such reward, or any part thereof, shall be paid to the sheriff of the county or his under-sheriff, or any of his deputies. It will be seen that the power to offer the reward is not given to the county, but to the sheriff. The general powers of a public corporation, and the nature of a power to incur liability to a person for ⁵⁴¹ apprehending a person accused of a criminal offense, are discussed at some length in *Patton v. Stephens*, 14 Bush, 324. The city of Covington ostensibly incurred liability to pay a reward for the apprehension of a person accused of a serious criminal offense. It was held, in effect, that the crime was not against the city of Covington; that it was against the sovereign authority of the state and not against any individual or any local community; that it is no part of the duty of any local subdivision of a state to bring to justice offenders against its laws; that the individual officers of the particular subdivisions of the state, in a way, are its officers,

as well as officers of the municipality, in that the state requires of them the performance of duties for it; that the legislature may authorize local subdivisions of the state to offer rewards for the apprehension of offenders against its laws, but that such power is not an ordinary corporate power; that it is not incident to any corporate power or a matter in which any local body has any interest, taken by itself, as distinguished from the whole body politic of the state; that the mere fact that the vigorous pursuit of offenders by the particular local subdivisions of the state in which their offenses are committed is an incidental benefit to the local communities, does not give such subdivisions power to expend public revenues to that end; that no question of mere expediency is involved in such matters; that no power can be implied in favor of a local political corporation which does not pertain to its matters of local control, and that such matters do not include, in any sense, the administration of the criminal laws. To the same effect is *Mountain v. Multnomah Co.*, 16 Or. 279, 18 Pac. 464.

The authority which industrious and able counsel for respondent have been able to cite to our attention to support their view is *Yavapai Co. v. O'Neil*, 29 Pac. 430, decided in the supreme court of the territory of Arizona. The reasoning upon which such decision is based leaves it without ⁵⁴² any considerable persuasive power. The foundation principle thereof is that bringing offenders to justice is one of the corporate functions of a county, in that it is one of its corporate duties to aid the local courts in the administration of justice by providing a courthouse and paying the expenses of officers and court proceedings, etc. The reasoning is clearly unsound, as has been seen by reference to numerous authorities. The law imposes on counties the duty to pay salaries of officers concerned in the administration of the criminal law, but that does not carry with it any other duty. That, as has been indicated, is merely the means resorted to by the state for compensating its agents in the prosecution of criminal offenses. That is true in respect to all the agencies of the state that have to do with the administration of its criminal laws. The duty of the county to pay such expenses is substantive in character and is imposed upon the county by express statute for a single purpose only. No other power is to be implied therefrom. The duty of performing the services, to be paid for by the county, is imposed by the state directly upon its own

agents, the particular officers designated by law. As intimated in *Mountain v. Multnomah Co.*, 16 Or. 279, 18 Pac. 464, a county board has no more right to contract or incur expense for the arrest of offenders against the criminal laws of the state than a town or school district. We should say, in passing, with reference to the Arizona case, that it was decided by a divided court, two of the four judges who took part therein dissenting on a question other than the one here considered, holding the law on such other question to be contrary to the holdings of this and all other courts but one, so far as we know, and to all elementary authority, and one of them dissenting from the decision on the particular question here involved. Neither in the opinion of the court nor the statements filed by the dissenting judges is any authority referred to on the main or any other question, clearly indicating that the decision was ⁵⁴³ not the result of thorough or extensive study. It is reasonable to presume it represents merely the individual notions of the judges, entirely independent of the wealth of authority upon the subjects involved, which was not understood to exist. They were guided in their decision by what they thought was most expedient, most promotive of the public welfare, not attempting to justify it by reference to any express power found in the statutes. It was thought, as shown by the opinion, that the great importance to individual communities of bringing criminals to justice and the inefficiency of a system that does not authorize them to compensate their local officers for pursuing offenders when they escape the boundaries of the state, justified a conclusion that power to do so was intended to be conferred by statute. The same reasoning is pressed upon our attention, but it is not persuasive in the face of the well-settled law as to the character of county government. It might be a very wise provision of law to lodge power in local communities, under such restraints as would be liable to secure discreet and efficient execution thereof, to pursue criminals that escape from the state, at local expense. Suffice it to say, however, that has not been done here up to this time, nor elsewhere, so far as we know, as regards a county board. That the general practice in Douglas county has been such that respondent sheriff believed, and had some ground to believe, that he could make excursions at will, or with the approval of the district attorney, beyond the confines of the state, in pursuit of offenders at the expense of his county, is exceedingly unfortunate; but

there is no power in the court to save him harmless from his mistake. He has neither a legal nor an equitable claim for compensation for services or expenses rendered or incurred on such excursions, whether he succeeded in his missions or not. No doubt as soon as an accused person was brought by him within the boundaries of the state, it was competent for the ⁵⁴⁴ sheriff to arrest him on his warrant and to charge the legal fee for service of the warrant and for travel to and from the point of arrest, so far as the services performed were outside of Douglas county: *In re Tisdale*, 1 Dec. Comp. Treas. 127, and cases cited.

The next most important subject presented for consideration is, Was the sheriff legally entitled to compensation on the mileage basis of ten cents per mile for travel on unsuccessful trips within the state to arrest persons for the apprehension of whom he held warrants, whether he made a successful trip for that purpose ultimately or not? The statute under which charges are allowed on the mileage basis (Stats. 1898, subd. 27, sec. 731), has received construction to the effect that it applies only when the travel to serve results in the arrest of the alleged offender, and it has been held that no compensation can be allowed in the absence of such arrest except in the discretion of the county board and on the basis of a reasonable allowance for the time necessarily employed and expenses incurred under subdivision 34 of such section: *Schneider v. Waukesha Co.*, 103 Wis. 266, 79 N. W. 228. As said in that case, and supported by authority, previous to the amendment of subdivision 34, embodied in the revision of 1898, no compensation was allowed to a sheriff for unsuccessful pursuit of offenders unless the escape was from custody without negligence on the part of the officer. Did the legislature, in providing for compensation for unsuccessful pursuit in attempts to arrest offenders in the first instance, intend to include such pursuit regardless of there being any subsequent successful pursuit—that travel to serve a criminal warrant should be limited to travel on a successful trip to serve a criminal warrant? The solution of that question must rest on the statute, in the light of the reason for the construction given to the language “travel to serve” in subdivision 27. In *Ex parte Wyles*, 1 Denio, 658, it was said that the rule is without exception that a statute allowing to an officer ⁵⁴⁵ “compensation for travel to serve” a criminal warrant is restricted to cases where the travel is successful; that it does not cover travel in various directions

where no arrest is made; that the term would support another and equally plausible construction, but that the one indicated is well established and is in accordance with sound policy in that it excites vigilance and fidelity, whereas the opposite rule would offer a strong temptation to remissness and fraud. In *Labette Co. Commrs. v. Franklin*, 16 Kan. 450, Justice Brewer delivering the opinion, it was held that "travel to serve" means when it results in a service, and that courts cannot extend the settled meaning of those words so as to give compensation to a sheriff upon the theory that the statute will admit of that construction; that travel to serve excludes travel when the purpose of the sheriff is not successful, and that such construction has been adopted by the great weight of authority. So it is not open to question now, as we have seen, but that the legislature intended, by the language of subdivision 27, section 731 of the Statutes of 1898, to convey that meaning said to best stimulate official fidelity to duty. By the same reasoning, "travel to serve" means travel on the trip to serve which is successful, leaving compensation for unsuccessful trips to serve criminal warrants to be compensated for under subdivision 34 in the discretion of the county board. Any other construction would, undoubtedly, open wide the door to the very mischiefs suggested in *Ex parte Wyles*, 1 Denio, 658—those mischiefs which the courts have assumed the legislature intended to guard against in allowing mileage fees for travel to serve a criminal warrant only where that travel is successful. If an officer may charge ten cents per mile on numerous trips in many directions to apprehend an offender, which are unsuccessful, if in the end he makes a successful trip and secures him, it is easy to see how he may use a warrant as the basis for a very large bill ⁵⁴⁶ against his county, by finally making a successful trip of a few miles to serve a warrant, and there be no efficient way for the county to defend against it or for anyone to discover the wrong. If fees are allowable only on the mileage basis when there is a successful trip to serve a criminal warrant and pay for unsuccessful trips is allowable only on the basis of a reasonable compensation for time spent and necessary expenses, the claim for services and expenses to be itemized and presented to the county board for consideration as provided for by law, with the certificate of the district attorney as to the necessity and propriety of the unsuccessful trips, and the claim supported by proof to the satisfaction of the board that the escape from

pursuit on the unsuccessful trips was not the result of carelessness or negligence of the sheriff, the danger of the public funds being uselessly and fraudulently expended in such matters will be reduced to a minimum. In our judgment the statute must be so construed. The unsuccessful trips to arrest offenders, made by the respondent sheriff, whether there was subsequently a successful trip to that end or not, should have been compensated for, if at all, under subdivision 34, section 731 of the Statutes of 1898.

The statutes clearly indicate a legislative purpose that for taking persons to the charitable or penal institutions of the state a sheriff shall be compensated for his personal services on the basis of time actually and necessarily occupied by him in the performance of such service, and that the rate of compensation shall be five dollars per day and expenses. The time basis is mandatory in all cases. Where the rate is not specified, the legislative judgment is indicated by reference to numerous other cases where the rate for similar services is specified. It is a safe rule to follow, one which is generally applied by courts, that where a fee is prescribed for a particular service, and a duty is imposed to perform another service of a similar character, for which compensation is ⁵⁴⁷ allowed but for which no rate is expressly fixed, the fee specified for such particular service should be regarded as indicating the legislative measure to be followed in all similar matters, in the absence of some special circumstances indicating that it was not intended to be such guide. The sheriff is allowed for service in executing a commitment to any industrial school, five dollars per day and his actual and necessary expenses, and no more, under section 4970 of the Statutes of 1898. The same compensation is allowed for executing a commitment to the state public school at Sparta: Stats. 1898, sec. 573e. The same is true as to the compensation for the sheriff's personal services in executing a warrant of commitment to a hospital for the insane under section 602. The compensation allowed for a sheriff's services in executing a commitment to the state prison is "a fair compensation for his time necessarily spent in transporting the prisoner, to be fixed and allowed by the proper auditing officer or auditing board of the proper county," and, "the amount actually and necessarily expended by him in transporting such prisoner, including the amount paid for boarding and lodging and such guards as may have been necessarily employed by him." We should say in pass-

ing that this statute evidently contemplates that the compensation of the sheriff for his personal services shall be fixed in advance of the rendition thereof, but in the absence of such fixing there can be no doubt but that the sheriff would have a legitimate claim, and that it would be perfectly competent for the board to adjust and pay it. The sheriff in this case took note of the legislative idea that charges for per diem fees should be at the rate of five dollars per day in making most of his claims, including his claims for unsuccessful pursuit of offenders, and the county board also seems to have recognized, in most cases, the legislative guide. But in the bills for executing commitments to the state prison, and numerous bills for executing commitments to the industrial school and other institutions, the ⁵⁴⁸ statute was wholly ignored, both by the county board and the sheriff. That was manifestly wrong upon the part of the sheriff, and was abuse of power on the part of the board. The learned circuit court, in approving the bills and finding that they were all reasonable, evidently overlooked the clear legislative purpose that time spent in performing service should be the basis of compensation, and that the rate should be five dollars per day, subject to variance in executing commitments to the state prison upon a showing indicating that performance of that service was more than ordinarily burdensome. Where it rests in the discretion of the county board to determine what is a reasonable compensation, the court should not revise their action in the absence of clear evidence of such manifest abuse of power and disregard of the statute as to show that the board failed to exercise a legal discretion, and not otherwise than as incidental to relief upon some other question, in order to do equity. That is the situation here. Compensation was allowed on a basis of miles traveled where the statute expressly requires it to be on a per diem basis. A ten cent per mile rate was allowed where the statute permits only the per diem fee of five dollars per day, and allows, by implication, such variations from that rate, in cases of executing commitments to the state prison, as the nature thereof in respect to there being more than ordinary difficulty, may justly require. We must assume that the trial court, in finding that, though the bills were allowed on a wrong basis, they were not inequitable as to amount, failed entirely to give attention to the legislative will as to the measure of compensation, and that it should be allowed on a per diem basis. The court must do what the county board

failed to do in order to work out the equities between the parties.

What has been said seems to cover all the matters presented for consideration by the exceptions to the findings and the assignments of error that need more than a brief ⁵⁴⁹ mention. The action of the board in allowing bills at the rate of five dollars per day for four days' time in executing each of several commitments to the hospital for the insane, when only one day and parts of two others were actually occupied in performing the service (finding 30), and in allowing for expense of assistance in executing commitments to the state prison without the official certificate of necessity therefor required by section 677 of the Statutes of 1898, and contrary to the express provision thereof (finding 31), and in allowing for expenses of telegrams sent and received in relation to the apprehension of persons charged with crime (finding 32), were such manifest abuses of power that no discussion thereof seems necessary. A "day" means a calendar day in all cases where the statute merely provides for compensation at a certain or a reasonable sum per day. Neither a county board that has to do with executing the law, nor courts that have to do with enforcing the execution thereof, have any right to call the work done in a calendar day any more than a day's work or service, in the absence of some statute expressly authorizing it: *Vogt v. Milwaukee*, 99 Wis. 258, 74 N. W. 789; *United States v. Garlinger*, 169 U. S. 316, 18 Sup. Ct. Rep. 364. That does not militate against the right of a municipality to consider any fractional part of a day, which is greater than the time ordinarily devoted to labor in one-half of a day, a day; but one calendar day cannot be legitimately called two days for the purpose of basing per diem pay thereon, unless the legislature so provides. It is not improbable that an officer may need assistance in executing a warrant or commitment to the state prison and not know it in time to obtain the certificate required before the rendition of the service. But that is not essential. If he obtains the certificate afterward and presents it as proof of the validity of his claim for compensation for the assistant, that satisfies the statute. However, in the face of the law commanding that no such claim shall be allowed unless the magistrate making the commitment certifies to the necessity ⁵⁵⁰ for assistance, to do otherwise is worse than a mere abuse of power. It is a usurpation of power,

and for the court to sanction it merely because the assistance was in fact necessary would be a judicial nullification of the legislative will in a field where it is supreme.

There are numerous matters covered by the findings and exceptions that are disposed of by the decision that the sheriff was entitled only to a salary for services of himself and deputies in his county, aside from boarding prisoners in the county jail. Otherwise, some of such matters would require serious attention. The following are disposed of with the salary question: Attending municipal court with prisoners (finding 9); serving warrants and travel in vagrancy cases (finding 11); raiding gambling-houses (finding 33); expenses of quelling riot (finding 34); conveying prisoners to the workhouse in Douglas county (finding 36); assisting the coroner in investigating the cause of death and pursuing without warrant or order of court and arresting the person supposed to be criminally liable therefor (finding 38); caring for persons charged with being insane till their cases could be heard by the county judge (finding 40); all claims for pursuit in Douglas county of persons accused of crime, whether such pursuit was or was not successful. The result of what has been said, independent of the salary question, renders these further claims illegal: Expenses and services in the pursuit of criminals outside the state, whether successful or not, and whether with or without a requisition (findings 12, 13, 14, 19, 35, 37); services and expenses for executing commitments to penal and charitable institutions in excess of the amount allowable on the basis indicated in this opinion (findings 28, 29); services in arresting criminals within the state, whether after being brought therein from without the state or not, where, previous to the successful trip, unsuccessful trips were made, in excess of charges on the mileage basis for necessary travel in the state on the ⁵⁵¹ successful trip and the legal fee for the arrest, and a reasonable compensation for time employed in pursuit of the offender within the state on the unsuccessful trips, and expenses, the necessity or propriety of the pursuit being certified by the district attorney, and satisfactory proof being furnished that the escape from pursuit on the unsuccessful trips was not attributable to carelessness or negligence of the sheriff (findings 17, 32, 37). On this branch of the case we should say in passing that the statute (Stats. 1898, subd. 34, sec. 731), clearly contemplates that the certificate of the

district attorney shall be sufficient to establish necessity or propriety of the pursuit, but not the amount of time employed nor the expense incurred, and clearly not the fact of whether the escape from pursuit was owing to the carelessness or negligence of the officer. We apprehend from the finding that the trial court overlooked that.

The foregoing indicates pretty clearly a long course of official infidelity, of utter disregard for statutory restraints where statutory direction and power should have been searched for at every step, amply justifying this appeal to judicial power by taxpayers. The learned trial court seems to have given controlling weight to the fact, established to its satisfaction, that the sheriff, the members of the county board, and their legal adviser, the district attorney, acted throughout in the utmost good faith, and that the sheriff relied upon the district attorney and acted under his direction and approval. The attitude of the officers in that respect is worthy of consideration to the extent of saving them from the condemnation which willful misconduct would merit, but has little bearing upon the validity of the sheriff's claims, paid or unpaid, which the county was neither liable for nor received any benefits from, as regards its corporate duties. Such attitude cannot make conduct which is absolutely wrong right, so as to enable the respondent sheriff to keep or receive money to which he has no legal or equitable ⁵⁵² claim. Much depends upon the fidelity, intelligence, and ability of a district attorney; and those who have a legal right to look to him for official guidance ought, from a moral standpoint, at least, to be considered justified by his action, where it is not outside his power or is so manifestly wrong that a layman ought not reasonably to be misled thereby. But a district attorney cannot confer power on a sheriff to render service at public expense except in the precise manner indicated by statute. All officials ought to understand that. He may place a warrant or other paper in the sheriff's hands and direct him to serve it, but the law of the land, not the direction of the district attorney, is to be followed in executing it. The sheriff, not the district attorney, is the chief peace officer in the county. His sphere of action is much broader than that of the district attorney. His duties are many and important, In many respects he is the most important officer in his county, and some of his most onerous duties have no financial incidents direct

to himself. The peace of the county is largely under his guardianship. His duties are well defined, regardless of the district attorney. Such attorney cannot enlarge those duties. He has no more right to direct the sheriff to go beyond the jurisdiction of the state or to do anything not required of that officer by law than any private citizen. The tendency in this case to shield official delinquency by the robe of charity and ignorance, supported by that of the district attorney, went too far in the decision appealed from. A state of ignorance, we are told, is a state of bliss, but it is not one of security in a legal sense, for all are presumed to know the law, and that needs to be applied with considerable rigor as to persons who deal with the public revenues. It is just such abuses as we have here considered that create the great burden of taxation more than do the legitimate expenses of government. County boards, and other boards, councils, and all in official station, should learn the lesson that public revenues ⁵⁵³ are not for private use, for dissipation under the forms of law in payment of illegal claims by or to the persons whom the people trust to guard and devote the same to the proper public use; that there is a power potent, if invoked seasonably, to compel restitution to the public treasury of money illegally, though by forms of law, withdrawn therefrom; that a person is not much safer in respect to his ability to permanently enjoy money wrongfully abstracted from the public funds than the person who wrongfully applies private property to his own use; that ill-gotten gain, the same in the one case as in the other, is liable to burn and destroy the hand that takes it. A strong public policy to that end, firmly enforced by the courts whenever judicial remedies are properly invoked, will be more promotive of fidelity in official life than mere public opinion. Experience shows that unfaithful officers can retain office to the detriment of the public good. The policy that prevents them from enjoying illegitimate fruits of official service is one of the most efficient agencies to prevent official infidelity. Such infidelity as we have here considered springs as much from inexcusable inattention to legal requirements, without any real moral turpitude, as from willful disregard of duty. The effect upon the taxpaying public, however, is the same in the one case as in the other. So the conclusion here reached does not require a reversal of the decision of the lower court as to there being no intentional wrong in the conduct of the officers whose administration is condemned.

As before indicated, there are some subjects covered by the sheriff's claims that the law contemplates should be left to the discretion of the county board. Its action in regard thereto is not binding upon the county, however, where it fails to exercise a legal discretion. As an original proposition, the court should not substitute its discretion for that of the board when it has acted without jurisdiction, either by acting where it has no right to act at all, or acting beyond ⁵⁵⁴ its jurisdiction. Treating such a matter in the abstract, the board ought to be required to consider the subject and exercise its discretion as the statute contemplates. But in a case like this, where equity has jurisdiction of all the parties and the primary subject of the suit, it may properly, in order to do equity to one party, compel the doing of equity by the other, disposing fully of all the questions directly involved in the litigation. To that end there must be in this case a full accounting between the sheriff and the county in the light of the rights of each as here decided, it being understood, pursuant to the statutes on the subject, that the salary of the sheriff, having once been fixed at fifteen hundred dollars per year and not thereafter changed at the time the county board had an opportunity to change it, it remained at fifteen hundred dollars, and was the salary incident to the office during respondent's term. If upon such accounting it shall be found that the money received by the sheriff from the county exceeds the amount thereof to which he is legally entitled and the amount of his unpaid claims which are legal, and the costs of this litigation, judgment should be rendered against him for the excess. If the balance be found the other way, judgment should be rendered in his favor against the county. Judgment for the plaintiff's costs and disbursements should be rendered against the defendant sheriff and the county. The final decree should be so framed that if such judgment for costs be not paid out of money going to the sheriff, as indicated, and be collected of the county, it shall have a judgment claim to that extent against him in addition to any other such claim.

By the Court. The judgment is reversed and the cause remanded to the circuit court for Douglas county for further proceedings in accordance with this opinion.

The Remedies of Taxpayers for illegal corporate acts are considered in the monographic note to *McCord v. Pike*, 2 Am. St. Rep. 92-105. A court of equity, at the instance of a taxpayer, may restrain a municipal corporation from making unauthorized appropriations of the corporate funds, and from making payments of illegal claims: *Adams v. Brennan*, 177 Ill. 194, 69 Am. St. Rep. 222, 52 N. E. 314; *Tukey v. Omaha*, 54 Neb. 370, 74 N. W. 613, 69 Am. St. Rep. 711, and cases cited in the cross-reference note thereto.

A *Contract to Pay a Public Officer* for services outside the line of his duties, and for which the law allows him no fee is enforceable: *Stadley v. Ballard*, 169 Mass. 295, 61 Am. St. Rep. 286, 47 N. E. 1000. As to the liability of a municipal corporation for expenses incurred by its officers outside of the performance of their official duties, see *James v. Seattle*, 22 Wash. 654, 79 Am. St. Rep. 957, 62 Pac. 84.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

BROCK v. BERRY, DEMOVILLE & CO.

[132 Ala. 95, 31 South. 517.]

EXECUTION SALES of Personal Property—Notice.—A sale of personal property under execution by an officer, without previously giving the notice of sale required by statute, renders the officer a trespasser from the beginning, and not entitled to the protection of his writ. (p. 897.)

EXECUTION SALES of Personalty—Place of Sale—Notice.—A sale by an officer of personal property under execution at a place other, different, and remote from, the place at which it is advertised to be sold is a sale without legal notice, rendering the officer a trespasser ab initio, and depriving him of the protection of his writ. (p. 898.)

EXECUTION SALES of Personal Property should always take place at or near the place where the property is when sold, in order that bidders may see and examine it. (p. 898.)

EXECUTION SALES of Personal Property En Masse can rarely be justified. (p. 898.)

EXECUTION SALES of Personalty—Improper Expense.—A charge for taking and typewriting an inventory of personalty attached and sold is not a legitimate expense to be charged by the officer making the sale. (p. 898.)

EXECUTION SALES.—**Violation of Process—Parties Who may Question.**—Creditors of a debtor whose property has been sold under execution in an action to which they were not parties may maintain a suit to set aside a mortgage on the property as fraudulent, and, as incident to the setting aside of the mortgage and without disputing the attachment liens growing out of such former action, to hold the officer and the plaintiff in attachment liable for the value of the property above the attachment liens, because of violation of process. (pp. 898, 899.)

ATTACHMENT—Trespasser—Abuse of Process.—If plaintiff in attachment neither indemnifies the officer, directs the act for which he is subsequently held liable, nor is present at the levy, he cannot be held liable as a cotrespasser with such officer. (p. 899.)

ATTACHMENT—Liability of Plaintiff for Abuse of Process.— If plaintiff in attachment never gave the officer any directions about the levy or sale, and was not present thereat, but did request the officer to take the goods attached out of his house, he cannot be held liable with the sheriff for an alleged abuse of process. (p. 900.)

D. W. Speake and L. P. Troup, for the appellant.

E. W. Godley, for the appellee.

99 HARALSON, J. 1. As to the liability of the sheriff for selling the property under the circumstances and conditions alleged, Mr. Freeman says, as to the proper notice of sale: "So far as the courts have spoken upon the subject, they have held that the selling of property under execution by an officer without previously giving the notice of sale required by the statute is such misconduct that the officer is no longer entitled to the protection of his writ. The result of this must be, that if sued in trespass, his defense cannot rest upon the process, nor can it be used in diminution of damages": 2 Freeman on Executions, p. 1659, sec. 286.

In *Wright v. Spencer*, 1 Stew. 577, 18 Am. Dec. 76, this court, touching this matter, said: "A misfeasance is the improper performance of some act which might have been lawfully done. The defendant here [the sheriff] had the right to take and sell the property, but was bound to do it as directed by law. If, then, he sold without the legal advertisement, it was the improper performance of an act which might have been lawfully done, and he was, according to strict definition, guilty of misfeasance. By this he was dismantled of his protection, and made a trespasser from the beginning. There can be no question but that he was liable to the action of trespass": *Nathan v. Shivers*, 71 Ala. 121, 46 Am. Rep. 303; *Hartshorn v. Williams*, 31 Ala. 154.

Connected with this complaint, and interwoven with it, is the averment and proof that the goods—other than the soda fountain, which latter article was not mentioned at all in the advertisement of sale which was made—were sold by the sheriff at a place other and different and remote from the place at which they were advertised to be sold. The result is, that having regard to the purpose of an advertisement of sale, such as ¹⁰⁰ the law requires, the goods were sold without legal notice: Code, secs. 1905, 1906. It was the duty of the sheriff to have advertised the time and place of sale, and to have sold at the place designated in the notice. Certainly, it was a vio-

lation of duty to advertise to sell at a designated place, and, afterward, make the sale at another and remote place: 2 Freeman on Executions, secs. 290, 302; Croker on Sheriffs, sec. 484.

Furthermore, the soda fountain was not present, with the other goods, when they and it were sold, but nearly a block away in the store where it was levied on, and not in view of the sheriff, bidders or those present at the sale. The sales of personal property under execution should always take place at or near the place where the property is when sold. Such sales must result in some, if not great, sacrifice of the property, unless those present desiring to buy have opportunity to see and examine the property offered for sale: 2 Freeman on Executions, sec. 290, and authorities in note 4; Murfree on Sheriffs, sec. 994; Croker on Sheriffs, sec. 493; Andrews v. Keith, 34 Ala. 728; Foster v. Mabe, 4 Ala. 402, 37 Am. Dec. 749.

2. The evidence shows that the property was sold in mass, including said soda fountain, or in what is called a "lumping sale," which, in a case of sale of personal property under execution, can rarely be justified: Croker on Sheriffs, sec. 495; 2 Freeman on Executions, sec. 296; Anniston Pipe Works v. Williams, 106 Ala. 324, 54 Am. St. Rep. 51, 18 South. 111. The evidence tends to show that by this character of sale, the property brought much less than it would have brought, if it had been properly offered in parcels.

3. The thirty-six dollars for taking and typewriting the inventory of the goods was properly decided not to be a legitimate expense charged by the sheriff in making the sale: Kahn v. Locke, 75 Ala. 332; Smith v. Huddleston, 103 Ala. 223, 15 South. 521.

4. It is said the complainants have no right to maintain this bill, since they were strangers to the suits in attachment. That would be true if they were mere intermeddlers. But they filed this bill, on April 6, 1898, to set aside an alleged fraudulent mortgage on the property conveyed by Cross to Mrs. Young, afterward ¹⁰¹ levied on by the said Troup and Brock, and as incidental to the setting aside of the mortgage as fraudulent, and without disputing said attachment liens, if established, but allowing them to be paid, to hold the sheriff and the plaintiffs in attachments liable for the value of the goods, above the attachment liens, on account of their alleged violations of process. The filing of the bill gave complainants a lien, if established, on the property from the date of its filing;

and while they were not parties to the attachment proceedings, they show that as creditors of the defendant in attachment, they had rights dependent upon and growing out of the sale. If the sale had been properly conducted, as they claim—said mortgage being set aside for fraud—the property levied on would have sold for enough to discharge the prior attachment liens, leaving a surplus sufficient to pay their debt, or the greater part of it, and this the evidence tends to show. Mr. Freeman says of persons occupying the attitude of complainants: "Persons not parties to the action may have rights dependent upon or growing out of the sale; and if so, they are not bound to remain idle and uncomplaining, while their interests are irregularly and perhaps fraudulently sacrificed. They may have acquired liens on the same property, subordinate to the lien of the plaintiff's writ, or have taken a transfer to which such lien is paramount. In that event they are the real parties in interest, and may institute proceedings to vacate the sale": 2 Freeman on Executions, sec. 305.

The complainants could not well have moved to vacate the sale until they had established their lien or title, which they could not do until they established the invalidity of said mortgage; and having moved in equity—as complainants were entitled to do—to set aside said mortgage for fraud, that court became competent to consider and adjudicate all questions connected with it.

5. But were the plaintiffs in attachment, Troup and Brock, joint trespassers with the sheriff, and liable, like him, for the wrongful execution of the process? On this question, Mr. Freeman says, supported as seems by reason and authority: "When the plaintiff places ¹⁰² his execution in the hands of an officer for service, he is presumed to intend that no action shall be taken thereunder not authorized by the terms of the writ. The sheriff may seize the property of a stranger, or do any other unauthorized act, without thereby creating any liability against the plaintiff, because the plaintiff is not presumed to have directed or ratified the illegal proceeding. But this presumption may be rebutted. The injured party may show that the plaintiff was a cotrespasser with the officer, and may thus make both responsible for their abuse of the writ. Where the plaintiff is present at the levy, or advises or directs it to be made, he is a cotrespasser with the officer": 2 Freeman on Executions, sec. 273. The same author again observes (section 303) touching the same matter: "An officer, upon any question of doubt arising, has the right to

ask the plaintiff for instructions and to demand indemnity in case the act insisted upon by the plaintiff may expose the officer to liability. When, however, the plaintiff neither indemnifies the officer, nor directs the doing of the act or acts for which the officer is subsequently subjected to liability, the plaintiff cannot be held answerable": *Burns v. Campbell*, 71 Ala. 271; *Lienkauf v. Morris*, 66 Ala. 406.

The evidence is wanting to show that the defendant Troup ever did anything more than sue out his attachment and place the writ in the hands of the sheriff. It is not shown he ever gave the sheriff any directions or instructions about the levy or sale, or that he was present at the sale. The same thing is practically true of the defendant Brock. The only thing he is shown to have done was—as deposed by the deputy sheriff, Turley—that after the levy, to state it in his own language, "he [Brock] afterward told me to take the goods out of the house they were in, as he wanted his house; he wanted it, I think, by the 15th [of April]." We do not find this request of Brock made of the sheriff to be such as to hold him liable for the alleged abuse of process by the sheriff. It was no interference by him with the process, and, at most, was a request which the sheriff was not bound to obey; and that officer might ¹⁰³ have obeyed it without being guilty of any of the alleged irregularities in the sale. There was no necessary causal connection between this request and the injury the sheriff is shown to have done the complainants growing out of the manner in which he sold the goods. The attachments were sued out, as has appeared, the 28th of March, 1898, and this bill was afterward filed on April 6, 1898.

The chancellor in his opinion says: "Said Troup and Brock, having been instrumental in having the goods attached by the sheriff, are liable, together with the sheriff, for any misfeasance or neglect causing a material depreciation in the value of the goods." He decreed accordingly. In this, we apprehend the learned chancellor fell into error. The suing out of the attachments to recover their rents by said parties was a legitimate proceeding, done more than a month before this bill was filed, and in no way interfered with any legal or equitable right of the complainants.

The decree below, in so far as it holds Troup and Brock liable to the complainants for the value of the goods sold by the sheriff, is reversed, and in so far as it holds Ryan, the sheriff, liable, is affirmed.

Reversed in part, affirmed in part, and remanded.

A *Sheriff's Sale* of personal property should be made only upon proper notice: *McMichael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560. As to the sufficiency of notices of judicial sales generally, see *Conley v. Redwine*, 109 Ga. 640, 77 Am. St. Rep. 398, 35 S. E. 92; and the notes to *Maddox v. Sullivan*, 44 Am. Dec. 238-240; *Hoffman v. Anthony*, 75 Am. Dec. 710-712. The property must be sold at the place where notice has been given that it will be sold: *Hall v. Ray*, 40 Vt. 576, 94 Am. Dec. 440. However, a sale of personalty is not void because the articles are not immediately in view when sold, if the property is in the power of the officer, and where bidders may inspect it: *Klopp v. Witmoyer*, 43 Pa. St. 219, 82 Am. Dec. 561. In this last case a sale of the entire stock in a lumber and coal yard en masse was held void.

The Abuse of Process and the liability therefor are considered in the monographic notes to *Barrett v. White*, 14 Am. Dec. 365-369; *Bradshaw v. Frazier*, 86 Am. St. Rep. 397-411. See page 408 of the last note cited for a discussion of the liability of a party to the action.

PEARCE v. PEARCE.

[132 Ala. 221, 31 South. 85.]

HUSBAND AND WIFE—Support of Wife Independent of Divorce.—Equity may, in a proper case, enforce in favor of a wife a claim for her support out of the estate of her husband, without and independently of proceedings for a divorce. (p. 901.)

Coleman & Bankhead and C. W. Davis, for the appellant.

M. B. McCollum and D. A. McGregor, for the appellee.

221 SHARPE, J. What in briefs for appellant is conceded to be the only question necessary to be passed on in this appeal has been settled adversely to appellant by decisions of this court which maintain that equity **222** will in a proper case enforce in favor of the wife a claim for her support out of the estate of her husband without and independently of proceedings for a divorce. See cases cited in brief for appellee, viz.: *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Hinds v. Hinds*, 80 Ala. 225; *Wray v. Wray*, 33 Ala. 187; *Mims v. Mims*, 33 Ala. 98; *Glover v. Glover*, 16 Ala. 440. We adhere to those decisions and affirm the chancery court's decision.

That a Wife may, under proper circumstances, maintain a suit for maintenance independently of a suit for divorce, see the monographic note to *In re Popejoy*, 77 Am. St. Rep. 228-245.

DRENNEN v. GILMORE.

[132 Ala. 246, 31 South. 90.]

SETOFF, to be available, must be owned by the defendant in absolute right, at the time suit is brought. (p. 902.)

SETOFF—Mutuality.—To sustain a setoff the debts must be mutual, and the demands must be subsisting causes of action, such as give to the parties a simultaneous cause of action, the one against the other, at the time suit is brought. (p. 902.)

SETOFF—Partnership.—A partner sued individually for a debt due from the partnership cannot set off a debt owed by plaintiff to the partnership without pleading and proving the ownership of such debt in absolute right at the time of the commencement of the suit. (p. 903.)

SETOFF as Matter of Right did not Exist at common law, but is a mere creature of statute, which cannot be construed to meet cases not specially included in its terms. (p. 903.)

E. J. Smyer, for the appellant.

J. E. Webb, for the appellee.

247 HARALSON, J. It is neither pleaded nor shown that the setoff attempted existed in defendant's favor, as a claim owned by him individually, at the time of the institution of this suit. For aught appearing, he could not at that time have successfully maintained an action on it in his own name and for his own benefit. "A setoff, to be available, must be owned by defendant in absolute right, at the time suit is brought. It is not enough that, together with another partner, the defendant owns the claim. It must be such demand as that he, in his own name, or in the names of defendants sued, without bringing in the name of a stranger to the suit may maintain an action of debt or indebitatus assumpsit upon it, against the party, or all the parties suing, as the case may be. Less than that is not mutuality. Ownership at the time of suit brought is of the **248** very essence of the right": Jones v. Blair, 57 Ala. 457; Wood v. Steele, 65 Ala. 436; Manning v. Maroney, 87 Ala. 563, 13 Am. St. Rep. 67, 6 South. 343.

In order to sustain a setoff under the statute, the debts must be mutual, and the demands must be subsisting causes of action, such as will give to the plaintiff and defendant a simultaneous cause of action, the one against the other, at the time the suit is brought: St. Louis etc. Packet Co. v. McPeters, 124 Ala. 455, 27 South. 518; Lawton v. Ricketts, 104 Ala. 430, 16 South. 59; Waterman on Setoff, sec. 25.

Section 40 of the code, existing substantially since 1818, and carried into the code of 1852, provides for the several as well as joint liability of two or more persons associated together as partners, and that any one of the associates, or his legal representative, may be sued for the obligation of all: Clay's Digest, 323; Code of 1852, sec. 2142.

Section 3878 provides that "mutual debts, liquidated or unliquidated demands not sounding in damages merely, subsisting between the parties, at the commencement of the suit, may be set off one against the other by the defendant or his personal representative, whether the legal title be in the defendant or not," etc.

The debt of Drennen & Co. to plaintiffs, for the collection of the draft by them for five hundred dollars belonging to plaintiffs, and left by plaintiffs with them for collection, was, under the statute, the individual debt of the defendant, W. M. Drennen, who was a member of that partnership, and for which he was personally liable, just as much so as if his partnership had not existed, and he had personally collected said draft. When sued individually on this debt by plaintiffs—as they were authorized by statute to proceed against him—he attempted to plead a debt the plaintiffs owed his firm, without pleading or proving that he was the owner of the setoff at the time the suit was commenced. This he could not do. The debts were not mutual, for the reason that plaintiffs owned the debt sued on, and Drennen & Co. owned the setoff. A right of setoff, to diminish or defeat a recovery, did not exist at common law, but is a creature of the statute, under which it does not exist, unless, as has ²⁴⁹ been stated, the plaintiff and defendant have subsisting causes of action, such as will give them simultaneous right to sue, the one against the other, at the time the suit is brought: Authorities supra.

If the rule invoked is a harsh one, as contended by the appellant, the reply is, that he has no statutory right to plead the setoff, and must stand where he stood, without any statute on the subject. The statute cannot be construed to meet cases not specially included within its terms. Our own adjudications heretofore substantially settle the case: *Pierce v. Bass*, 1 Port. 232; *Von Pheel v. Connally*, 9 Port. 452; *Hoyt v. Murphy*, 18 Ala. 316; *Duramus v. Harrison*, 26 Ala. 326; *Evans v. Sims*, 37 Ala. 710; *Fancher v. Bibb Furnace Co.*, 80 Ala. 484, 2 South. 268; *Cannon v. Lindsay*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 South. 676; *Bradley Fertilizer Co. v. Pollock*, 104 Ala. 402, 16 South. 138.

The plaintiffs did not claim interest further than from June 30, 1894, a period of six years and seven months from that date to January 30, 1901, the date of the judgment. The debt and interest to that date amounted to seven hundred and sixty-three dollars and thirty-three cents, for which amount the judgment should have been rendered, instead of for seven hundred and ninety dollars, as found by the judge. The judgment will be corrected so as to make it for seven hundred and sixty-three dollars and thirty-three cents, and, as corrected, it will be affirmed.

The Right of Setoff is a creation of statute and is strictly construed: *Bradley v. Smith*, 98 Mich. 449, 39 Am. St. Rep. 565, 57 N. W. 576; *Davis v. Noll*, 38 W. Va. 66, 45 Am. St. Rep. 841, 17 S. E. 791. A setoff is allowed only when there is mutuality in the demands: *Smith v. Washington Gaslight Co.*, 31 Md. 12, 100 Am. Dec. 49; *De Camp v. Thomson*, 159 N. Y. 444, 70 Am. St. Rep. 570, 54 N. E. 11. A claim owing to a partnership cannot be set off against debts owing to a member of the firm individually: *Olson v. Lamb*, 56 Neb. 104, 71 Am. St. Rep. 670, 76 N. W. 433. See, further, *Jack v. Klepser*, 196 Pa. St. 187, 79 Am. St. Rep. 699, 46 Atl. 479; *Very v. Clark*, 177 Mass. 52, 83 Am. St. Rep. 260, 58 N. E. 131; *Manning v. Maroney*, 87 Ala. 563, 13 Am. St. Rep. 67, 6 South. 343; *Cannon v. Lindsey*, 85 Ala. 198, 7 Am. St. Rep. 38, 3 South. 676; monographic note to *St. Paul etc. Trust Co. v. Leck*, 47 Am. St. Rep. 592.

BLUTHENTHAL v. TOWN OF HEADLAND.

[132 Ala. 249, 31 South. 87.]

MUNICIPAL CORPORATIONS—Implied Liability Under Ultra Vires Transaction.—While a municipal corporation is not liable on an express contract which is ultra vires, it is liable in an action of implied assumpsit to the extent to which a loan advanced to it under an ultra vires transaction has been expended and devoted to the necessities of the corporation. (p. 905.)

MUNICIPAL CORPORATIONS—Liability on Prohibited Contracts.—A municipal corporation can make no contract which is prohibited by its charter or by statute, and if it enters into such contract, and money or other property is furnished under it, the city is not bound even on an implied assumpsit, although the money or property may have been used by it. (p. 906.)

MUNICIPAL CORPORATIONS—Implied Liability.—Municipal corporations are liable to actions of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are malum in se, or violative of public policy. As to the latter they are not liable in any manner. (p. 906.)

Espy, Farmer & Espy, for the appellant.

Pearce & Pace, for the appellee.

251 HARALSON, J. An ultra vires contract is one that is wholly and manifestly outside of the charter or constituent act of the corporation or some valid legislative act applicable to it, and contracts in this sense ultra vires import in general no corporate liability directly upon the contract: 2 Dillon on Municipal Corporations, sec. 969. Incorporated companies have no powers except those which their charters confer upon them either expressly or as incidental to their existence: *Beach v. Fulton Bank*, 3 Wend. 583; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Alabama Gold Life Ins. Co. v. Central Agr. etc. Assn.*, 54 Ala. 73; *Taylor v. Agricultural etc. Assn.*, 68 Ala. 235; 2 Dillon on Municipal Corporations, sec. 969; *Green's Brice's Ultra Vires*, 28.

While it is true that no corporate liability is imposed on the corporation when sued on such a contract, it is well established that "persons who have in any way advanced money to a corporation, which money has been devoted to the necessities of the corporation, are considered in chancery (and at law, in the equitable action for money had and received) as creditors of the corporation to the extent to which the loan has been so expended": *Green's Brice's Ultra Vires*, 724; and the corporation is liable in an action of implied assumpsit: 1 Dillon on Municipal Corporations, sec. 126, note 1. The rule is thus stated by Mr. Tiedeman, quoting Field, C. J., in *Argenti v. San Francisco*, 16 Cal. 252, 282: "The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, implies an obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund, not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons whether natural or artificial. . . . The money must have gone into **252** the treasury or been appropriated by her, and when it is property other than money, it must have been used by her, or be under her control": Tiedeman on Municipal Corporations, sec. 164.

The evidence in this case shows that the goods purchased were received and sold and the money paid into its treasury, or appropriated to its uses. If the defense rested wholly on the

ultra vires character of the transaction in the purchase of the liquors, it would be unavailing. This question was fully discussed and settled in the case of *Allen v. Intendant etc. of La Fayette*, 89 Ala. 641, 8 South. 30.

A distinction, however, exists between acts or contracts simply ultra vires, and those which are illegal because made in violation of a positive provision of statute. When contracts are prohibited by statute to be made, they are, if made, illegal, and not simply ultra vires, and are subject to the rules governing the action of courts in respect to illegal contracts. It is well understood that a corporation can make no contract which is prohibited by its charter or by the statute law of the state; and if such a contract is entered into by the municipality or its officers, and money or other property is furnished under it, the city is not bound, although the money or property may have been used by it: 1 *Dillon on Municipal Corporations*, secs. 133, 447; *Thomas v. Richmond*, 12 Wall. 349. A promise to pay will not be implied from a contract which is void, because of the disregard of a plain statutory requirement: *Tiedeman on Municipal Corporations*, sec. 164; *Wood v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671.

In considering these questions, on an examination and citation of authorities, this court, in the case of *Allen v. Intendant etc. of La Fayette*, 89 Ala. 641, 8 South. 30, formulated the following rule: "Municipal corporations are liable to actions of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects, through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are *malum in se* or violative of public policy."

The act to authorize the establishment of dispensaries by municipal and other subdivisions of this state, ²⁵³ approved February 18, 1899 (*Acts 1898-99*, p. 108), in section 9, provides that "the dispenser shall buy and sell (spirituous, vinous and malt liquors) for cash only." This was a prohibition of his buying or selling on credit: *Tiedeman on Municipal Corporations*, sec. 165; *Black on Interpretation of Laws*, 64, 65; 15 Am. & Eng. Ency. of Law, 2d ed., 935, 936.

The evidence was without conflict that the plaintiffs sold, and the dispensers bought, the liquors for the recovery of the value of which this suit is brought, on open account on thirty days' time or credit. This was a transaction prohibited by the stat-

ute, on that account illegal and void, and no cause of action arises from it for recovery, either on the contract itself or in assumpsit on an implied contract, although the city received and got the benefit of the goods sold.

There was no error in the general charge given for defendant.

Affirmed.

The Doctrine of Ultra Vires in its application to private corporations is considered in the monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180. The doctrine is said to be applied with greater strictness to municipal bodies than to private corporations: *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830, 33 N. W. 333. The general rule is that a municipal corporation is not estopped to deny the validity of a contract which its officers were without authority to make: *Portland v. Bituminous Pav. Co.*, 33 Or. 307, 72 Am. St. Rep. 713, 52 Pac. 28; *State v. Murphy*, 134 Mo. 548, 56 Am. St. Rep. 515, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132. However, a county may be liable for the value of goods furnished it under an unauthorized contract, if it retains and uses the goods: *Auerbach v. Salt Lake County*, 23 Utah, 105, 91 Am. St. Rep. 687, 63 Pac. 907.

OWENSBORO WAGON COMPANY v. BLISS.

[132 Ala. 253, 31 South. 81.]

CORPORATIONS DE FACTO Exist when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might have been legally incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law. (p. 908.)

CORPORATIONS DE FACTO are Protected by the same law and governed by the same legal principles as corporations de jure, so long as the state acquiesces in their existence and exercise of corporate functions; and a private citizen whose rights are not invaded has no right to inquire collaterally into the legality of their existence. (p. 908.)

CORPORATIONS DE FACTO—Estoppel to Deny Existence of.—A person who contracts with a de facto corporation cannot, in a suit by the corporation on such contract, deny and disprove the rightfulness of its existence. (pp. 908, 909.)

CORPORATIONS DE FACTO—Liability of Stockholders.—Paid-up subscribers to stock in a corporation de facto, who were guilty of no fraud in its organization, who never agreed to be anything but stockholders, and never consented to become partners therein, or held themselves out as such, cannot be held liable as partners. (pp. 909, 911.)

PARTNERSHIP—Proof of Existence.—Declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them. It is

only when the partnership has been otherwise proved that the declarations of one partner are evidence against the other as to the conduct of the partnership business. (p. 911.)

PARTNERSHIP—Proof of Existence of.—The existence of a partnership can never be established by general reputation, or on hearsay evidence. (p. 912.)

PARTNERSHIP—Holding Out as Partner.—In the absence of an agreement to become a partner, a person cannot be held liable as such, unless he holds or permits himself to be held out as a partner. (p. 912.)

CORPORATIONS DE FACTO—Notice of Existence.—If incorporation papers, except the certificate of incorporation, are on file in the proper office, though not recorded, at the time a contract is entered into with the corporation, a person contracting with it is charged with constructive notice of its de facto existence. (p. 913.)

CORPORATIONS DE FACTO—Failure to Pay License Fee.—The failure of a de facto corporation to pay the statutory license fee for doing business does not affect its existence as such corporation, nor render its stockholders liable as partners. (p. 913.)

J. T. Ashcraft and R. E. Simpson, for the appellant.

C. E. Jordan and E. O'Neal, for the appellee.

256 HARALSON, J. "A corporation de facto exists, when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law—when there is an organization with color of law, and the exercise of corporate franchises": *Snider v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658; *Central Agr. etc. Assn. v. Alabama Gold Life Ins. Co.*, 70 Ala. 120.

"Corporations may exist either de jure or de facto. If of the latter class, they are under the protection of the same law, and governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done by a direct proceeding on the part of the state, from whom is derived the right to exist as a corporation, and whose authority is usurped": *Id.*; *Lehman v. Warner*, 61 Ala. 455.

It is also well settled, as a corollary to the foregoing principles, that when one contracts with a corporation, which is in the exercise of corporate functions, but which is a de facto corporation merely, he will not, in a suit by the corporation on a con-

tract made by him with it in its corporate name, be allowed to deny and disprove the rightfulness of its existence: 4 Am. & Eng. Ency. of Law, 198; *Smartwout v. Michigan etc. R. R. Co.*, 24 Mich. 390. In the case last cited, Cooley, J., declares that "it ²⁵⁷ is plainly a dictate, alike of justice and public policy, that in controversies between the de facto corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised": *Snider v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658; *Cahall v. Citizens' M. B. Assn.*, 61 Ala. 232. In the *Snider* and *Troy* case it was further held that the same principle applied, whether in suits against stockholders to enforce unpaid subscriptions—in which case the stockholder will not be allowed to dispute the due incorporation of the company—or by a creditor of the corporation, who by denying the existence of the corporation seeks to recover his debt against the stockholders, by suing them as partners. It is a correct and well-settled principle that "persons who have contracted with the corporation as such, and have acquired liens against it, are estopped from denying its corporate existence, for the purpose of holding its shareholders liable as partners": *Snider v. Troy*, 91 Ala. 224, 24 Am. St. Rep. 887, 8 South. 658; *Taylor on Corporations*, sec. 148. "A corporation de facto has an independent status, recognized by the law, as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation." Adopting the language in *Fay v. Noble*, 7 Cush. 188, this court said in *Snider's* case: "Surely it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them."

The facts in this case, without conflict, show that the defendants and a number of other persons, pursuing closely the provisions of the statute for the purpose (Code, art. 11, p. 425), associated themselves together for the purpose of incorporating the Farmers' Implement Company. They filed their declaration in the office of the probate judge of Lauderdale county, in accordance with the provisions of section 1252 of the code. This declaration was indorsed "Farmers' Implement Co. Declaration." "I hereby certify that the within conveyance was filed in the office for record on the fifth ²⁵⁸ day of February, 1898, and duly recorded in vol. ——— of ———, on page ———. Judge of Probate."

The word "conveyance," in this certificate was a mere self-corrective clerical error, used for the word "declaration"; and the fact that the name of the judge of probate is not signed thereto amounts to nothing. In the absence of statute prescribing what constitutes the filing of a paper, it is said to be filed whenever it is delivered to and received by the proper officer. A bill in chancery, for instance, is to be considered as filed when it is put in the custody and power of the court, by depositing it with the register, or with his assistant in his office, with the intention of filing it, although the fact and date of filing are not then indorsed on it: *Ex parte Stow*, 51 Ala. 69; *Truss v. Harvey*, 120 Ala. 636, 24 South. 927; 8 Am. & Eng. Ency. of Pl. & Pr. 928.

On the same day the declaration was filed the judge of probate issued to two of the proposed incorporators a commission to open books of subscription to the capital stock of the corporation, as per section 1253 of the code. Afterward, the commissioners, acting under this commission, opened books of subscription, and more than fifty per cent of the capital stock was duly subscribed by parties deemed solvent, a list of whom was returned to the court as a part of the report of the commissioners, and payments in money were made by each of the subscribers of at least twenty per cent of the stock subscribed by them, respectively. The subscribers met and organized the corporation by the election of a board of directors, a president, a secretary and general manager, and a treasurer, all of which was duly certified and returned in writing to the judge of probate, as provided by section 1255 of the code. The only missing links for the perfection of a corporation *de jure* under the statute, as appears, were, that these papers so returned and filed with the probate judge were never recorded in his office, and no certificate of incorporation was issued by said judge, declaring said corporation fully organized, as provided by said section 1255 of the code. It is too plain for controversy that a corporation *de facto* was thus created, there being no allegation or evidence of fraud on the part of defendants and associates ²⁵⁹ in the premises. The evidence shows, and the fact is undisputed, that under such incorporation the company entered upon the transaction of business; that it was understood in the community to be a corporation, and, as such, it instituted and maintained suits in the justice's court of Florence. It was shown that these defendants took no part in the management of the corporation; that they each paid in full the stock subscribed by them, and never knew

that a de jure corporation was not in fact organized, but supposed and believed it had been done. The defendant Young was president of the company, and testified that one J. M. Lassiter, the secretary and general manager, transacted all the business, and he, the witness, had nothing to do with its management, and never examined the books of the concern. The defendant Bliss testified to the same thing, as for himself. There was no evidence tending to show that defendants had anything to do with contracting the account on which they are sued, or knew anything about it; nor that they ever consented to become partners in said corporation, or agreed to be anything more than stockholders therein, or ever held themselves out, or agreed that anyone else should hold them out, as partners therein, or were guilty of any fraud in the organization of said company. So far as the evidence shows, or tends to show, their conduct was characterized by good faith toward their associates and the persons transacting business with the company.

The evidence of plaintiff tended to show that it had no actual notice of the incorporation of said company as a de facto organization, even. Its secretary and treasurer, W. A. Steele, testified by deposition that no member of the Farmers' Implement Company ever informed the plaintiff that said implement company was a corporation; that plaintiff never heard that it was such an organization, and that he thought that J. M. Lassiter, deceased, who was the secretary and managing agent of said implement company, informed the plaintiff by letter that defendants were members of a copartnership by that name, though he could not find or produce said letter. The evidence does not show, however—even if ²⁶⁰ that statement were taken as evidence of the fact, a question we need not decide—that either of defendants ever authorized Lassiter to make such an admission as to them, or that they ever knew he made any such statement, without which they were not bound by his declarations. The declarations of one partner, not made in the presence of his copartner, are never competent to prove the existence of the partnership between them. It is only when the partnership has been otherwise proved that the declarations of one partner are evidence against the other, as to the conduct of the partnership business. The existence of a partnership can never be established by general reputation or on hearsay evidence: *First Nat. Bank v. Leland*, 122 Ala. 289, 25 South. 195.

In the absence of an agreement to become partners in the company, defendants cannot be held liable as such unless they

hold themselves out as partners. Holding one's self out, or permitting himself to be held out, as a partner in a firm will make him liable as such to third persons who have been misled by, or who have acted upon such holding out; and in such case the one so held out would be estopped as to them to deny that he was a partner: 17 Am. & Eng. Ency. of Law, 879; George on Partnership, 80; *Marble v. Lypes*, 82 Ala. 322, 2 South. 701; *Alabama F. Co. v. Reynolds*, 85 Ala. 19, 4 South. 639. As we have said, there is an entire absence of evidence tending to show that defendants ever knowingly or intentionally entered into a partnership relation with their associates, or ever held themselves out as copartners with them, or permitted any other person to do so.

The evidence shows, furthermore, beyond conflict that at the time the plaintiff's contract with the Farmers' Implement Company was entered into—on the 2d of July, 1898—the papers above referred to, for the incorporation of said company, were on file in the office of the probate judge, having been filed therein on the 5th of February preceding, and remained there on file until the 28th of October following, when the judge of probate allowed J. M. Lassiter to take them away—for what purpose is not shown. The judge took the receipt of Lassiter for the papers, which receipt the judge himself wrote or dictated, reciting what papers they were, ²⁶¹ and that they were "all the papers that were ever filed in the office of the said probate judge of said corporation."

The plaintiff at the time it contracted with said association had thus constructive notice of what was done toward the incorporation of the company, and that it had, at least, a de facto existence, which status was unaffected by the action of said Lassiter in taking said papers from the probate office.

The fact that the Farmers' Implement Company had not, at the time it purchased the goods from plaintiff, paid the state and county license to do business, could not affect the status of the de facto corporation differently from what it would have affected a de jure corporation. The only possible effect such failure could have would have been to render the company liable to the penalty prescribed by statute in such cases.

It is contended, again, that the failure to pay the fee prescribed by section 1287 of the code rendered the effort at incorporation abortive, and that the company, in consequence, did not have a de facto existence, even. In *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 South.

566, we held that if a commission is issued to a corporation organized under the statutes, the fact that the required fee was not paid would not, of itself, prevent the corporation from having a de facto existence, but its contract as stated would be void. The statute under which that decision was made (Acts 1894-95, p. 1024) provided that all contracts by any corporation which had not first complied with the requirement for the payment of this fee should be wholly void. That provision was not carried into the code of 1896, but was omitted therefrom—section 1287. Without reference to that fact, however, the failure to pay the fee would not, as stated, of itself have prevented the formation of a de facto corporation. If they never intended and did not agree to become partners, but desired in good faith to organize under the statute a corporation, which they failed to fully perfect, but did organize one de facto, under color of law, which came into the exercise of corporate functions, the stockholders of such ²⁶² an organization cannot be made liable as partners: Authorities supra.

Under the pleadings and the legal evidence as developed on the trial, the court, in trying the case without a jury, very properly, as we think, found in favor of the defendants, and rendered judgment accordingly.

Affirmed.

The Legal Existence of a Corporation cannot be attacked collaterally, but only in a direct proceeding instituted by the state: *Postal Tel. etc. Co. v. Oregon etc. Ry. Co.*, 23 Utah, 474, 91 Am. St. Rep. 704, 65 Pac. 735; *Monongahela Bridge Co. v. Pittsburg etc. Traction Co.*, 196 Pa. St. 25, 79 Am. St. Rep. 685, 46 Atl. 99. If a contract is made by what purports to be corporation, its force cannot be avoided nor its obligation denied because of any defect in the organization of the corporation, and he who entered into the contract with the assumed corporation is estopped to deny its corporate existence and capacity: See the monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 185.

As to Whether Stockholders are Liable as Partners when there has been a defective organization of the corporation, the authorities are conflicting: See *Bergeron v. Hobbs*, 96 Wis. 641, 65 Am. St. Rep. 85, 71 N. W. 1056; *Duke v. Taylor*, 37 Fla. 64, 53 Am. St. Rep. 232, 19 South. 172; monographic notes to *People v. Montecito Water Co.*, 33 Am. St. Rep. 186; *Rutherford v. Hill*, 29 Am. St. Rep. 602, 603.

BOLTON v. CUTHBERT.

[132 Ala. 403, 31 South. 358.]

DETINUE—Ownership—Cotenancy.—Parties plaintiff, to recover in an action of detinue, must have an interest severally in the thing sued for, and if a third person, not a party to the suit, is a joint owner with them in such property, they cannot recover, although he has left the state, or declined to allow the use of his name as a party plaintiff. (pp. 914, 915.)

DETINUE—Ownership.—Objection that plaintiffs in an action of detinue do not own the entire interest in the property sued for may be raised under the plea of the general issue, and there is no necessity for a plea in abatement. (p. 915.)

DETINUE—Ownership—Indemnity.—An action of detinue for the recovery of property owned in cotenancy may be prosecuted by one cotenant in the name of all without the consent of the other co-owners, upon indemnifying them against costs. (p. 916.)

APPELLATE PRACTICE—Presumption as to Rulings—Evidence Improperly Admitted.—The presumption that there was evidence to support the rulings of the trial court will not be indulged on appeal when the record shows that the evidence was improperly admitted or excluded. (p. 916.)

Thornton & Inge, for the appellant.

G. L. and H. F. Smith, for the appellee.

405 TYSON, J. Action of detinue. There are two parties plaintiff, both of whom testified as to the manner of their acquisition of title to the mules in controversy. Their evidence showed affirmatively and without dispute that one Vaughan was a joint owner with them of the property, and that they had never acquired his interest. "It is well settled in this state that to entitle the plaintiffs to recover in the action of detinue they must have the entire interest in the thing sued for; they must have the absolute property, with the right to the immediate possession or a special property, as in the case of a bailee": Price v. Talley, 18 Ala. 21; Thompson v. Silvey & Co., 123 Ala. 694, 26 South. 644; Vinson v. Ardis, 81 Ala. 271, 2 South. 879. The burden is on the plaintiff to show an exclusive legal title to the chattel sued for; "and should it appear that he was not a tenant in common or a joint tenant with another, and that the legal title was in both, then both must join in detinue, for one alone cannot under such circumstances sustain the suit": Parsons v. Boyd, 20 Ala. 112. The cases of Russell v. Russell, 62 Ala. 48, Smith v. Tankersly, 20 Ala. 212, 56 Am. Dec. 193, and Perminter v. Kelly, 18 Ala. 716, 54 Am. Dec. 177, cited by appellee's counsel, as opposed to this principle, were actions of

trover. Under the authority of those cases, an action by one tenant in common against his cotenant can only be maintained where there is a conversion, wholly to his own use by the tenant sued, by a sale of the chattel. Clearly, there is no conflict between the two lines of cases.

It is contended that the defendant cannot avail himself of the nonjoinder of Vaughan as party plaintiff under the plea of the general issue; that he should have filed a plea in abatement. The ownership by plaintiffs of the entire interest in the mules is of the very essence of their right to maintain the action, and as the general issue denied their title and right to the immediate possession ⁴⁰⁶ of them, there was no necessity for a plea in abatement. It is of no consequence that Vaughan had left the state or declined to allow the use of his name as party plaintiff. The plaintiffs had the right to prosecute the action in the name of all jointly interested in the property sought to be recovered, whether Vaughan was willing or not, upon indemnifying him against costs: *Harris v. Swanson*, 62 Ala. 299. Having this right, it was their duty to join him, and they must suffer the consequences of their neglect.

It may be said that as the bill of exceptions does not purport to set out all of the evidence, the overruling by the court of the motion of defendant to exclude all of plaintiffs' evidence on the ground that it showed without conflict that at the time of the institution of this suit the title to the property sued for was in some one else besides the plaintiffs, will be sustained upon the presumption, usually indulged, that there was evidence to support this ruling. While this court has gone very far in indulging this presumption to sustain the judgment below, where charges are involved, it has never extended it to a case where evidence was improperly admitted or excluded: *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Postal Tel. Co. v. Hulsey*, 115 Ala. 193, 22 South. 854; *De Loach v. Robbins*, 102 Ala. 288, 48 Am. St. Rep. 46, 14 South. 777; *McDonald v. Wood*, 118 Ala. 589, 24 South. 86. In reply to this, it may be contended that the motion to exclude was addressed to the sufficiency of the evidence rather than to its materiality and relevancy, and, therefore, the ruling is saved by the presumption. While it is true the motion does, in a sense, question its sufficiency to support the judgment, yet the direct office to be performed by it is to have the evidence excluded from the consideration of the jury because of its immateriality and irrelevancy. For if it was insufficient to support the plaintiffs' cause of action, it was

clearly immaterial and irrelevant, and the defendant was entitled to have it excluded. But aside from this, the presumption could not well be indulged in the face of the sworn admissions of the plaintiffs. Again, at the time the motion was made, the record shows affirmatively that this was the state of the case as made by the testimony introduced by plaintiffs. This being true, the overruling of the ⁴⁰⁷ motion was error, which is shown by the record. Error being shown, the presumption of injury must be indulged, unless the record affirmatively rebut this presumption: 2 Ency. of Pl. & Pr. 552. In *Moore v. Clay*, 24 Ala. 235, 60 Am. Dec. 461, certain testimony was admitted by the trial court, against the objection of the plaintiff, on condition that it would be ruled out, unless the defendant offered certain other evidence. It was urged as the bill of exceptions did not purport to set out all the evidence, the presumption must be indulged that the condition upon which the court admitted the objectionable testimony had been complied with. In reply to this contention, the court said: "The court was put in error as to the condition upon which he would rule out the testimony, and if the facts of the case would have justified it, it was the duty of the judge to have shown in the bill of exceptions that the error was rectified or cured by the introduction of the necessary preliminary proof. The rule is, that when the court is shown to have committed error, it must set itself right, and this court could not intend, in the absence of a statement to that effect in the record, that the error was corrected or deprived of its injurious effects."

As we cannot know that plaintiffs will amend their complaint by making Vaughan a party plaintiff, it is unnecessary to consider any other assignment of error.

Reversed and remanded.

Detinue Cannot be Maintained by one of several tenants in common; and though the nonjoinder is not pleaded in abatement, it may be taken advantage of under the general issue by demurrer or by motion in arrest of judgment: *Cain v. Wright*, 5 Jones (N. C.), 282, 72 Am. Dec. 551.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
v. MARBURY LUMBER COMPANY.

[132 Ala. 520, 32 South. 745.]

RAILROADS—Negligent Escape of Sparks—Burden of Proof.

To recover damages for fire, alleged to have been caused by the negligent escape of sparks from a railway locomotive, the burden is on the plaintiff in the first instance to show that the fire was caused by such sparks, and this being proven, a presumption of negligence arises against the railway company, casting the burden upon it to show that such locomotive was properly constructed, equipped with approved devices and appliance to prevent the escape of sparks, in good repair, and prudently managed and controlled. Upon proof of these facts, the presumption arising from the mere communication of fire from the locomotive is rebutted, and the plaintiff cannot recover without proof of other specific acts of negligence or want of care on the part of the railroad company. (pp. 917, 918.)

RAILROADS—Negligent Escape of Sparks—Evidence.—If it is sought to recover damages for fire alleged to have been caused by the negligent escape of sparks from a locomotive, and the evidence as to the origin of the fire is circumstantial, the fact that the weather had been dry for several days prior to the fire is admissible in connection with other circumstances tending to show that the fire was caused by sparks emitted from such locomotive. (pp. 918, 919.)

RAILROADS—Negligent Escape of Sparks—Evidence of Nature of Train.—In an action to recover damages for fire alleged to have been caused by the negligent escape of sparks from a railway locomotive, evidence as to whether the train drawn by such locomotive was light or heavy is admissible as tending to show the number and size of the sparks emitted, and this is a circumstance to be considered in determining whether the train was properly equipped and handled. (p. 919.)

RAILROADS—Fires—Evidence of Speed of Train.—If it is sought to recover damages for a fire alleged to have been caused by sparks from a railway locomotive, evidence of the excessive use of steam in attempting to make up lost time is a fact competent to be considered, in determining whether the company exercised due diligence in the operation of the train, and on the question whether the fire occurred by reason of sparks from the locomotive. (p. 920.)

RAILROADS—Fires—Size of Sparks Emitted—Evidence.—If, in an action to recover damages for a fire alleged to have been caused by sparks from a railroad locomotive, it is in evidence that the sparks emitted were as large as the end of witness' little finger, it is competent for another witness, testifying as an expert, to state the size of sparks emitted by an engine in good condition and properly equipped. (p. 921.)

T. G. & C. P. Jones and A. C. Birch, for the appellant.

Watts, Troy & Caffey, for the appellee.

523 HARALSON, J. 1. The principle is well established in this court as a rule of evidence that in an action against a rail-

road company to recover damages resulting from fire alleged to have been caused by the negligent escape of sparks from a locomotive running on defendant's road, the burden is on the plaintiff, in the first instance, to show that the fire was caused by ⁵²⁴ sparks emitted from defendant's locomotive, and when it is shown that the fire was thus caused, which is, when disputed, always a question of fact for the jury, the mere communication of the fire from the railroad engine is of itself sufficient to raise a presumption of negligence against the company. With this prima facie proof of defendant's liability raised in plaintiff's favor, the burden is then devolved upon the defendant of showing that the engine alleged to have caused the fire was properly constructed, was equipped with approved devices and appliances to prevent the escape of fire and sparks, was in good repair and prudently managed and controlled; and upon proof of these facts by the defendant, the presumption arising from the mere communication of fire from the engine is rebutted, and the plaintiff cannot recover, without making proof of other specific acts of negligence or want of care on defendant's part: Louisville etc. R. R. Co. v. Reese, 85 Ala. 497, 7 Am. St. Rep. 66, 5 South. 283; Louisville etc. R. R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 South. 438.

2. The cotton destroyed was situated in a pen on the right hand or north side of the railroad running toward Birmingham from Montgomery, at which point it appears the track ran east and west. The pen was about fifty feet six inches from the center of the track. A freight train had only a few minutes before passed up, when the cotton was discovered to be on fire. The train, as the evidence tended to show, was a short one, consisting of about fifteen cars attached to the engine, the grade was ascending at the point, the train was moving rapidly, and the engine was emitting an unusual quantity of sparks, larger than engines generally emit; that the day was clear and rather windy, the wind blowing in the direction of the cotton—from a southeastern direction and in a northwesterly direction—and there was no fire in any of the houses or structures near the cotton. Here the witness testifying to these facts for plaintiff was asked: "Had it been raining the day before the accident, or had it been dry weather?" to which question he replied that the weather had been clear for several days. The defendant objected to the question on the ground that it was irrelevant, incompetent ⁵²⁵ and inadmissible, shedding no light as to what condition the engine was in. The objection was properly over-

ruled. The burden was on the plaintiff to introduce evidence to show that the fire originated from the passing engine, and any circumstance tending to show that it did thus originate was competent. The proof of how the fire originated was entirely circumstantial. If the weather had been clear and dry and not rainy for several days previous to the accident, it was a circumstance competent to be considered, in connection with the other evidence, as tending to show that the fire might have originated more readily from the engine, and did so originate, and that if the weather had been rainy and damp the fire might not have so readily been communicated to the cotton by sparks, the distance it was away from the engine.

3. The witness Bledsoe testified that he was within six or eight feet of the track when the engine passed; that there were a good many sparks coming out when the train passed, and a heap of them fell on the platform of the store near by, and were about the usual size. He was asked, "Was it a light train or a heavy train?" He answered that it was a light train, and in answer to another question, he did not count the cars, but there seemed to be fourteen or fifteen of them. The defendant objected to the question on the grounds that it called for incompetent and irrelevant evidence, and because the character of the train had nothing to do with the condition of the engine. While the latter objection—the one relied on to show the incompetency of the evidence—may in point of fact have been true, whether the train was a light one or a heavy one, in the number of cars of which it consisted, yet if it was a heavy train, consisting of a great number of cars, it is common knowledge that it would have required a greater expenditure of effort, so to speak, on the part of the engine, and a greater exhaust of steam by it, especially when moving rapidly up grade, than would have been the case if the train were a short one, requiring less power to move it, a condition when fewer and smaller sparks would likely be emitted than if the engine were drawing a heavy train. The ⁵²⁶ number and size of the sparks was a circumstance to be considered in determining whether the train was properly equipped and handled.

4. Becket, as an expert witness for defendant, testified as to the construction of engines and appliances for preventing the escape of sparks, stating that there had been some changes in material in them during the past twenty years, and they had been trying to better them, but had not succeeded; said that what he called standard netting was the same as it was the first

time he saw a spark-arrester, about twenty years ago; that sometimes the netting had to be cleaned, and a man would pound it with a piece of iron. He was asked on the cross by plaintiff in this connection, "Is not that iron liable to increase the size of the spaces?" He answered, "Not unless it is punched; they merely take a piece of iron and jar it out of the netting, and this would not affect the netting unless they punched a hole through it." There was no proof that the netting had been punched, and if there was error in allowing the question, it was error without injury, since the question as asked was not answered, and the answer given was entirely without prejudice to defendant.

5. Woods, the engineer who handled the train at the time of the accident, testified for defendant that the more force that was used the greater the number of sparks, and that he was running twenty-five or thirty miles an hour when he passed Bozeman, the place the fire occurred. He was asked by plaintiff in this connection, "Now, is it not a fact that your train was running behind time, and that you were running faster to make up that time?" The defendant objected on the ground that the evidence called for was incompetent, irrelevant, and inadmissible. In *Perdue v. Louisville etc. R. R. Co.*, 100 Ala. 539, 14 South. 366, the court stated that, as a matter of law, it cannot be said that any rate of speed of a railroad train away from those places where the statute regulates it is negligence per se, and that, whether or not rapid running at points not regulated by statute would be negligence, would depend upon the conditions under which it ⁵²⁷ might be maintained. Nor was the fact of being late and running behind time evidence per se of negligence: *Norfolk etc. Ry. Co. v. Ferguson*, 79 Va. 241; *New York etc. R. R. Co. v. Kellan*, 83 Va. 851, 3 S. E. 703. But it has been held in an action for damages for fires alleged to have been caused by a locomotive that the excessive use of steam is a fact competent to be considered in determining whether or not the company exercised due diligence in the operation of the train, and on the question as to whether the fire occurred by reason of sparks from the engine: *McCormick v. Chicago etc. R. R. Co.*, 41 Iowa, 193; *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun. 182; *Union Pac. R. R. Co. v. De Busk*, 12 Colo. 291, 13 Am. St. Rep. 221, 20 Pac. 752. The witness did not answer the question in full, but replied, simply, "I was late," without stating that he was "running behind time," and was "running faster to make up that time," as he was asked. The

answer he made did not, without more, imply that he was making up time and running faster in order to do so. It was neither favorable nor unfavorable to either party, and even if the question ought not to have been allowed, it was without injury to defendant.

6. Thornton, a witness for plaintiff, had testified that the engine when it passed emitted sparks as large as the end of his little finger, and Billingslea, that the sparks were as large as a cow-pea. Gross, a witness for the plaintiff, an experienced engineer, testified that he had heard all the testimony in the case about the fire, and how the engine was equipped. He was asked, "If the netting to that engine was such as has been testified to here, and it was in good repair and condition, would it throw out sparks as large as the end of your little finger?" The defendant objected on the ground that there was no testimony that the sparks were as large as the little finger of witness. Thornton and Billingslea were allowed to be recalled, each of whom exhibited his little finger to the witness. The witness did not answer the question. But he was asked another question, "Do you know what size sparks would emit?" He answered that no engine in proper condition should have thrown sparks as large as a cow-pea and as large as ⁵²⁸ a pin-head, and to this question and answer no objection was made. We find no error here.

7. The court gave several charges requested by defendant, and refused several. The vices of those refused, without reviewing them separately, will appear. We have examined them, and conclude they were properly refused.

A motion was made for a new trial, based on rulings assigned as errors and which we have been considering. It was overruled, and we find no occasion for disturbing the verdict and judgment.

Affirmed.

The Liability of Railroads for Fires caused by sparks from locomotives, including matters of evidence, is considered in the monographic note to *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 70-79; *Dunning v. Maine Cent. R. R. Co.*, 91 Me. 87, 64 Am. St. Rep. 208, 39 Atl. 352; *Peters v. Chicago etc. R. R. Co.*, 121 Mich. 324, 80 Am. St. Rep. 500, 80 N. W. 295. It is the duty of a railway corporation to supply itself with such engines as will be least liable to set fire, and be reasonably safe from destroying the property of others along its line: *Watt v. Nevada Cent. R. R. Co.*, 23 Nev. 154, 62 Am. St. Rep. 772, 44 Pac. 423, 46 Pac. 52, 726. Negligence on the part of the company is the gist of the action for a loss occasioned by a fire, and the burden of proof is on the plaintiff: *Henderson v. Philadelphia etc. Ry. Co.*, 144 Pa. St. 461, 27 Am. St. Rep. 652, 22 Atl. 851;

Meyer v. Vicksburg etc. R. R. Co., 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 South. 218. But proof that a fire originated from sparks emitted from a locomotive raises a presumption of negligence consisting in a defect in the construction of the locomotive, or want of care in its management, and casts upon the company the burden of rebutting it: Louisville etc. R. R. Co. v. Reese, 85 Ala. 497, 7 Am. St. Rep. 66, 5 South. 283; Gulf etc. Ry. Co. v. Benson, 69 Tex. 407, 5 Am. St. Rep. 74, 5 S. W. 822; Bass v. Chicago etc. R. R. Co., 28 Ill. 19, 81 Am. Dec. 254.

ARNDT v. CITY OF CULLMAN.

[132 Ala. 540, 31 South. 478.]

EVIDENCE—Judicial Notice.—Municipal Charters are public acts, of which courts take judicial notice. (p. 924.)

MUNICIPAL CORPORATIONS—Negligent Construction of Sewer—Pleading.—If a city charter imposes upon the corporate authorities the duty to establish, keep in repair, regulate and control drains, gutters, sewers and aqueducts, or cause this to be done, it is only necessary to aver in a complaint to recover of the corporation for injury by reason of the negligent construction of a sewer, or for allowing the sewer to become filled up, the existence of such duty by way of inducement, which is sufficiently certain when it is averred generally that it was the duty of the city to keep the sewer in repair or proper condition, or that it was legally bound to do so, or some such equivalent averment. (p. 925.)

MUNICIPAL CORPORATIONS—Notice of Defective Sewer—Pleading.—To maintain an action against a city to recover for injury caused by a defective sewer, or by allowing such sewer to become filled up, the plaintiff must aver and prove express notice to the city of the alleged defect in the sewer, or facts from which it may be inferred that the corporate authorities were properly chargeable with constructive notice thereof. (p. 925.)

MUNICIPAL CORPORATIONS—Defective Sewers.—Constructive Notice to a city of the defective condition of one of its sewers may be inferred from its notoriety, and from its continuance for such length of time as to lead to the presumption that proper officers of the town or city did in fact know, or with proper vigilance and care might have known, the fact. (p. 925.)

MUNICIPAL CORPORATIONS—Defective Sewers.—If a city, in the construction of a sewer, causes a large quantity of water which naturally flows in another direction to be diverted to and flow upon plaintiff's property in destructive quantities, it is liable in damages for just compensation, whether the work is done negligently or not, and a fortiori when the sewer is constructed in a negligent manner. (p. 925.)

MUNICIPAL CORPORATIONS—Right to Raise Sidewalks.—If a city is given power "to cause and procure all sidewalks now established, or hereafter to be established, to be graded, leveled, and curbed," and "such power as may be needed to compel the abutting property owners to pay the expenses and costs of the same," the city cannot compel the property owner himself to raise and level the sidewalk adjoining his property, but it can do the work itself and compel such owner to pay therefor. (p. 926.)

MUNICIPAL CORPORATIONS—Damages Arising from Change of Grade of Street.—A city is not absolved from liability for damages to a property owner from the fact that his lot is below the grade of the street as fixed by the city, if in changing such grade it prevents the natural flow of water and diverts it onto such lot. (p. 928.)

MUNICIPAL CORPORATIONS—Defective Sewers—Overflow—Evidence of Amount of Rainfall.—A city is bound to make provision for the carrying off through its sewers of such floods as may be reasonably expected, judging from such as have previously occurred, although at irregular and wide intervals of time; and it is not liable for damages which could not have been guarded against by the exercise of ordinary diligence, such as may be caused by unprecedented rains. Hence, if a city charged with damages arising from the overflow of a defective sewer offers evidence to show that the damage was caused by an unprecedented rainfall, evidence is admissible in rebuttal to show that such rainfall was not even extraordinary. (p. 928.)

JURY TRIAL—Evidence in Civil Cases.—Belief of a fact by the jury to its reasonable satisfaction is all that is necessary in a civil case; it need not be induced to such belief "by a preponderance of the evidence." (p. 929.)

MUNICIPAL CORPORATIONS—Defective Sewers.—The rights of a property owner in a city are not dependent on the error of judgment of the city in respect to constructing a sewer of sufficient size to carry off the water, even if the work done on it was performed in a skillful manner. (p. 929.)

MUNICIPAL CORPORATIONS—Defective Sewers—Protection from Overflows.—A city is bound to protect a property owner therein against overflows caused by diverting waters from their natural channels by means of a defective sewer, and he is not bound to build a wall or other protection to prevent such overflow and protect his property. (p. 929.)

J. B. Brown and A. Ahlrichs, for the appellant.

Brown & Curtis, for the appellee.

545 HARALSON, J. The complaint, consisting of two counts originally, was subjected to demurrer on numerous grounds which were sustained. Thereupon plaintiff amended by adding six other counts, to which defendant demurred on thirty-six grounds, all of which were sustained. The plaintiff, allowed to amend, added eight other counts, to which defendant's counsel interposed seventy-three grounds of demurrer, which were sustained as to all the counts, except the fifteenth and sixteenth. To these two counts defendant filed seven special pleas, besides the plea of the general issue. Demurrers were interposed by plaintiff to all the special pleas, which were sustained except as to the fourth. Thereupon the plaintiff took issue, and the case was tried upon the plea of the general issue, and on issue joined on the fourth plea.

Some of the counts proceed for the claim of damages on the

alleged negligent construction of a sewer, in that it diverted the water from its natural flow and precipitated it onto plaintiff's lot, doing it great damage; ⁵⁴⁶ others for its negligent construction, in that it was too small to carry off the waters let into it, and they were backed onto plaintiff's lot, and still others, that the city allowed the sewer to fill up and become choked with sand, gravel and dirt, causing the water to back onto plaintiff's lot, doing the damage complained of, of which condition the city had notice and did nothing to prevent it.

The charter of the city is a public act of which courts take judicial notice, as though it had been set out in each count in the declaration: *Smoot v. Mayor etc.*, 24 Ala. 112, 121; *Albritton v. Mayor*, 60 Ala. 492, 31 Am. Rep. 46.

The charter of Cullman provides that the mayor and councilmen "shall have full and complete power," among other things, "to have free power and authority to cause and procure all streets, alleys and sidewalks now established or hereafter to be established in said city to be graded, leveled, curbed, etc. . . . To have all such power and authority as may be needed to compel the abutting property owners to pay all or such portion of the expense and costs as they may decide of the same, and on failure or refusal of the property owner to pay such amounts, to tax the same against the property, which tax shall have the lien of and be enforced and collected as other city taxes"; and "to establish, keep in repair, regulate and control drains, gutters, sewers, aqueducts and reservoirs, and to compel lot owners to drain the same [the lot] and ditch it [the lot] at the expense of the owner when the owner fails or refuses after five days' notice to drain or ditch it [the lot]," etc. "To erect, establish and keep in repair bridges and culverts, and to adopt regulations necessary for the same": Acts 1890-91, p. 160, sec. 19, subds. 11, 12, 35.

In section 24 of the charter the mayor and councilmen are given the authority to levy and collect each year upon all real and personal property and subjects of state taxation in said city a tax not exceeding one-half of one per cent of the value of such property or subjects of taxation during the preceding year, etc.

⁵⁴⁷ The city charter having devolved on the corporate authorities the duty of causing streets and sidewalks in said city to be graded and leveled, and to establish, keep in repair, regulate and control drains, gutters, sewers, aqueducts, etc., or cause this to be done, a duty to these ends was thus imposed on the city, and it was only necessary to aver in the complaint the ex-

istence of this duty by way of inducement, which is sufficiently certain when it is averred, generally, that it was the duty of the city to keep the sewer in repair or proper condition, or that it was legally bound to do so, or some such equivalent averment: *City Council v. Wright*, 72 Ala. 411, 47 Am. Rep. 422.

It was incumbent on the plaintiff, in order to maintain the action, to aver and prove express notice of the alleged defect in the sewer, or facts from which it might be inferred that the corporate authorities were properly chargeable with constructive notice thereof. "Constructive notice of such defect [however] may be inferred from its notoriety, and from its continuance for such length of time as to lead to the presumption that proper officers of the town or city did in fact know, or with proper vigilance and care might have known, the fact": *City Council v. Wright*, 72 Ala. 411, 47 Am. Rep. 422, and authorities there cited. The facts stated in some of the counts of the complaint, as we shall see, were sufficient as averments of implied or constructive notice: *City Council v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; *Lord v. City of Mobile*, 113 Ala. 360, 21 South, 366.

In *City of Eufaula v. Simmons*, 86 Ala. 515, 6 South. 47, it was held that if a municipal corporation, in the construction of ditches and sewers in the improvement of its streets, causes a large quantity of rain water, which naturally flowed in another direction, to be diverted to flow on the plaintiff's property in destructive quantities, the defendant corporation would be liable in damages for just compensation, whether the work was done negligently or not, and a fortiori, when such ditches and drains have been constructed in a negligent manner. In this respect a corporation stands on the same footing as a private individual, and incurs the same liability: 10 Am. & Eng. Ency. of Law, 2d ed., 350, 352.

548 "The accumulation in one channel of a large volume of water by the act of the city places upon it the duty to see to it that suitable provision is made for the escape of the water into natural watercourses or other channels which will carry it off without injury to private property; and if by reason of the insufficiency of the drain or sewer provided the accumulated waters are cast upon private property to its injury, the city must respond. . . . If surface water is collected in gutters and made to flow to the mouth of a sewer, where by reason of the insufficiency of the sewer it accumulates in large quantities and thence flows back upon private property, the munic-

ipality must respond in damages": 24 Am. & Eng. Ency. of Law, 946, 947.

"A city has no more right to plan or create an unsafe and dangerous condition in one of its public streets than it has to create a public nuisance"; and it may be added that it has no such right in respect to the creation and maintenance of drains and sewers that are insufficient and damaging to abutting property owners: Mayor etc. v. Lewis, 92 Ala. 352, 9 South. 243; Mayor etc. v. Starr, 112 Ala. 98, 20 South. 424; Albritton v. Mayor etc., 60 Ala. 486, 31 Am. Rep. 46.

In accordance with these principles it was held in Alabama etc. R. R. Co. v. Shahan, 116 Ala. 302, 22 South. 509, that a complaint which shows the situation of plaintiff's property, so as to be overflowed from a culvert and damaged, and avers that the culvert was insufficient for the passage of water during rainfalls, and that defendant negligently allowed said culvert to fill up partially by the washing of sand and loose rock in it, which further obstructed the free passage of water through said culvert, by reason of which negligence on the part of defendant the water from said culvert backed over and flooded plaintiff's storehouse, causing injuries complained of, sufficiently avers negligence on the part of defendant.

From the principles above announced, it will appear that counts 1, 6, 7, and 8 are defective, and the demurrers to them should have been sustained; and that those numbered 2, 3, 4, 9, 10, 11, 12, 13, and 14 were ⁵⁴⁹ good, and demurrers to them should have been overruled.

The issues on which the case was tried arise: 1. On the allegations of the fifteenth and sixteenth counts in the complaint, charging negligence on the city, which is denied by defendant; and 2. If defendant is shown to have been guilty of negligence, on the fourth plea, charging contributory negligence on the part of the plaintiff, from which his injuries proximately resulted.

As to the fourth plea, it may be well to state that under the provisions of the charter, which we have copied above, the city had no right to compel the plaintiff, on notice to do so, to raise and level the sidewalk adjacent to his lot, but that they had merely the authority to raise it themselves and require plaintiff to pay for the cost of doing the work; but this question is not raised by demurrer.

The averments of negligence in these counts are that the defendant, having power by charter to that end, graded First

avenue and raised the grade thereof above plaintiff's lot from six to eight feet, and thereby changed the natural flow of the surface water that fell, and collected it on First avenue, in time of rainfall, from its natural course; and in order to drain said water from said avenue, the city made a drain on the opposite side of the avenue from plaintiff's lot, in length one hundred feet or more, and then across said avenue, so as to carry said water back to its natural channel below plaintiff's lot; that plaintiff, in order to protect his lot from damage by the washing of clay and sand used in the grading of said street, erected a stone wall on his said lot along First avenue, six or eight feet high by about one hundred feet long; that in the construction of said drain by the city on the opposite side of the avenue from plaintiff's lot the city negligently constructed it of insufficient size to carry off the surface water that collected on First avenue in time of rainfall, opposite plaintiff's lot; that the city constructed a culvert in said ditch across the avenue to carry off this water, and made it so small that it was incapable of carrying off the water that ~~550~~ flowed into it, and by reason of such incapacity the culvert became totally or partially stopped up with said dirt and trash, and on the 1st of March, 1899, large quantities of water (from rainfall) collected on said avenue and in said ditch or drain and caused the same to overflow, and volumes of water in destructive quantities were cast from the avenue onto plaintiff's lot; that his said wall was undermined and thrown down, and quantities of sand and clay were cast on plaintiff's lot, and a large part of its surface and soil were washed away, etc. The foregoing are the substantial averments of negligence and damage as set up in the fifteenth count.

The sixteenth, like the fifteenth in other respects, sets up also as negligence that it was the duty of defendant to keep said drain or sewer in proper condition and repair, so that the water that collected thereon in time of rainfall could pass off; and averment is made that said ditch, drain or sewer became choked or stopped up by the washing of sand, dirt or trash therein, so that the water that collected therein in time of rainfall could not pass off, and that although the defendant had notice that said ditch or drain was so clogged or choked, it failed to exercise reasonable care, skill and diligence in removing such obstructions, and allowed the same to remain—although it had reasonable time to clean the same

out—until the 1st of March, 1899, when large quantities of water collected therein, and caused said drain to overflow and cast the water across the avenue in the manner and with the results set forth in the fifteenth count.

The contributory negligence of the plaintiff, set up in the further plea, is, that he was notified to raise the level of his sidewalk to his lot, which he failed to do, and if he had complied with its requirements, the damage complained of would not have occurred.

There were numerous questions raised on the admission and exclusion of evidence. These questions in groups relate to showing that plaintiff's lot was below the grade of the street fixed and leveled by the city. As to this it may be said that the city was not absolved from damages to plaintiff, by so changing the ⁵⁵¹ grade of said avenue as to prevent the natural flow of the water from the street and diverting it onto plaintiff's lot: *Town of Avondale v. McFarland*, 101 Ala. 381, 13 South. 504; *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147; *Mayor etc. v. Coleman*, 58 Ala. 570; *Mayor etc. v. Jones*, 58 Ala. 684; *Cooley on Torts*, p. 688, sec. 520. Other objections related to the admission of evidence by defendant tending to show the condition of the lot at the time of the trial. Such evidence on another trial should be admitted. Others still related to the notice, or want of it, that defendant had as to the condition of the culvert, and the character of the rainfall at the time of the alleged damage. The defendant sought to introduce evidence tending to show the character of the rain that fell, with the view of showing that it was unprecedented. Plaintiff in rebuttal sought to show that it was not even extraordinary in that section, and questions designed to bring out such evidence were not allowed. It is manifest that under such conditions the court should have allowed the evidence. A municipal corporation, for the efficiency of its sewers, as has been held, is bound to make provision for such floods as may be reasonably expected, judging from such as have previously occurred, although at irregular and wide intervals of time, and is not liable for damages which could not have been provided for or guarded against by the exercise of ordinary diligence, such as unprecedented rains: 10 Am. & Eng. Ency. of Law, 243; 13 Am. & Eng. Ency. of Law, 711; 24 Am. & Eng. Ency. of Law, 1st ed., 948; *Columbus etc. Ry. Co. v. Bridges*, 86 Ala. 449, 11 Am. St. Rep. 58, 5 South. 864.

By observance of the principles announced, there should be no difficulty on another trial as to questions in the admission and rejection of evidence. It would greatly extend the opinion to consider them separately or even in groups, and we fail to see the necessity for so doing.

The court, at the request of plaintiff, gave numerous charges, quite as favorable to him as could have been expected. A great many were asked by him and refused, ⁵⁵² which we deem it unnecessary to pass on, since counsel make no argument to show the alleged error of the court in refusing to give them.

Under the issues on which the case was tried, while charge 1 may not have been positively incorrect, yet it might have been properly refused, because of its tendency to mislead the jury to assume that the defendant was guilty of negligence.

If charge 2 were otherwise correct, it was rendered bad in postulating that the jury must believe the fact therein stated as necessary to belief, "by a preponderance of the evidence." Belief of the fact to reasonable satisfaction was all that was necessary. Moreover, the fact therein stated as necessary to their belief, while averred in count 16, and if that were the only count, would be necessary to be proved, is not found in count 15, under which the plaintiff might have been entitled to recover, without reference to the proof of this particular fact found in count 16. The charge went only to the latter count, and not to both counts on which the case was tried.

Charge 3 is based on a misapprehension of the issues in the case, and was improper. There is no averment that there was an unskillful construction of the sewer which was of sufficient size to carry away the waters. The contention was that the city had constructed a sewer which was of insufficient size to discharge the accumulated waters. Moreover, the rights of plaintiff were not dependent on the error of judgment of the city in respect to constructing a sewer of sufficient size to carry off the water, even if the work on it was done in a skillful manner.

Charge 4 is predicated on the idea of plaintiff's having built a weak and insecure wall, whereas he was not bound to construct any wall at all. In so doing, as the evidence tends to show, out of great caution, and as a voluntary measure of safety, he went to very considerable expense to protect himself against overflows from the street, after the city had graded the streets and done that which threatened him with overflows

from waters diverted from their natural channels. The ⁵⁵³city was bound to protect him against overflows caused by its own conduct. The charge was also argumentative, and lays stress on particular phases of the evidence.

No error in the other charges is insisted on.

Reversed and remanded.

The Liability of Municipal Corporations for damages caused by sewers is considered in the monographic note to *Chalkley v. Richmond*, 29 Am. St. Rep. 737-744. If a city turns into a sewer a much larger amount of surface water and sewage than was contemplated at the time of its construction, it is answerable in damages to an abutter who is injured thereby: *King v. Granger*, 21 R. I. 93, 79 Am. St. Rep. 779, 41 Atl. 1012. And if it allows drains and sewers to get out of repair, so as to cause surface water to settle on private property, it is liable therefor: *Brunswick v. Tucker*, 103 Ga. 233, 68 Am. St. Rep. 92, 29 S. E. 701. See, also, *Kelly v. Pittsburgh etc. R. R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 000, 63 N. E. 233; *Wendel v. Spokane County*, 27 Wash. 121, 91 Am. St. Rep. 000, 67 Pac. 576.

PILCHER v. HICKMAN.

[132 Ala. 574, 31 South. 469.]

EXECUTIONS—Right to Demand Indemnity.—If property levied on by an officer under execution is in the possession of the defendant therein, it is presumptively his, and the officer, in the absence of notice of anything to rebut such presumption, has no right to demand indemnity or refuse to make the levy, or release it when made upon the refusal of the plaintiff to indemnify him. (p. 931.)

EXECUTIONS—Possession of Defendant—Presumption—Liability of Officer.—If property levied on by an officer under execution is in the possession of the defendant therein, it is presumptively his, and the officer, if he knows nothing to rebut such presumption, cannot be charged as guilty of a conversion, unless after notice that it belongs to another, he insists upon retaining possession and proceeds with the sale, in which case he is liable to the true owner in trespass or trover. (pp. 931, 932.)

W. O. Long, for the appellant.

Espy, Farmer & Espy, for the appellee.

⁵⁷⁵ **TYSON, J.** Action of trover, originally commenced against sheriff and purchaser at execution sale. The complaint was amended by striking out the purchaser as party defendant and judgment was obtained against the other defendant, who prosecutes this appeal.

The evidence shows, without dispute, that the execution was regular on its face and issued out of the circuit court of Henry county; and that it was levied upon the mule found in the possession of the plaintiff's father, who was the defendant in execution. That the ⁵⁷⁶ mule had been in his possession ever since the plaintiff claims to have owned it—some ten or twelve months. After the levy, the defendant in this suit took possession of the mule and sold it under the execution as the property of the defendant in the writ. It was admitted by plaintiff that he saw the mule being taken under the writ from the possession of his father and was present when it was sold under execution. There was no evidence that the sheriff had any knowledge of the plaintiff's claim to the mule or that plaintiff gave him any notice whatever of his claim. We have noted the fact of the knowledge of the plaintiff of the levy and sale, not for the purpose of working out an estoppel against him in this action against the sheriff, but simply to show that he had the opportunity of giving notice that the mule was his, and at least presumptively showing that the sheriff had no knowledge of his claim, but relied upon the father's possession as evidence of his ownership. Whether his conduct would work an estoppel against him in favor of the purchaser we need not, and do not, decide. Having found the mule in the possession of the father, the defendant in execution, the sheriff had the right, in the absence of knowledge or information to the contrary, to presume that he was the owner of it, and it was his duty to levy upon it as the property of such defendant (Murfree on Sheriffs, sec. 963); and, of course, it was his duty to sell it unless he came into the possession of a knowledge of facts before the sale which if followed up would have disclosed that the property did not belong to the father. Doubtless, if after acquiring such information he then proceeded with the sale, he could be made liable in trespass or trover. Nor could this duty, under the undisputed facts of this case, have been shirked by him so as to avoid responsibility to the plaintiff in execution by resort to a demand for bond of indemnity under section 1903 of the code. It is only when a reasonable doubt exists whether the personal property levied on belongs to defendant in execution that such bond can be demanded. Where, as here, the defendant in the writ was the *prima facie* owner, in the absence of anything to rebut the presumption, ⁵⁷⁷ the sheriff would have had no right to refuse to make the levy or to release it after made, had the

plaintiff refused to have indemnified him upon demand. So, then, the facts of this case clearly bring it directly within the principle laid down by Mr. Freeman: "If the property is in possession of the defendant in execution, it is *prima facie* his. The officer may, therefore, levy upon it, if he knows nothing to rebut this presumption, and cannot be charged as guilty of a conversion, unless, after notice that it belongs to another, he insists upon retaining possession of it and refuses to deliver it to the owner": 2 Freeman on Executions, 3d ed., sec. 254.

The affirmative charge requested by defendant should have been given.

Reversed and remanded.

A Sheriff is Entitled to a Bond of Indemnity from the plaintiff before proceeding further after levying upon goods, the title to which is disputed, if he honestly believes the claim to be well founded. There must, however, be some substantial reason for the demand for indemnity, and the officer must act in good faith in making it: Robey v. State, 94 Md. 61, 50 Atl. 411, 89 Am. St. Rep. 405, and note.

SCOTCH LUMBER COMPANY v. SAGE.

[132 Ala. 598, 32 South. 607.]

PURCHASER WITHOUT NOTICE of Unrecorded Lost Deed.

A bona fide purchaser of land for value without notice, either actual or constructive, of an unrecorded lost deed, acquires title as against such deed and those claiming thereunder. (p. 933.)

VENDOR AND PURCHASER—Cotenancy—Notice of Unrecorded Deed.—The record of a deed by a person who has a recorded deed to an undivided one-seventh interest in a whole of the land conveyed, and an unrecorded and lost deed to five of the remaining six-sevenths, is not constructive notice to a bona fide purchaser for value from the record owners of such remaining six-sevenths, that the first-mentioned grantor claimed to have owned six-sevenths instead of one seventh of the land. (p. 934.)

VENDOR AND PURCHASER—Notice of Unrecorded Deed.

A bona fide purchaser of an undivided interest in land from a grantor in possession thereof, under a complete recorded chain of title thereto, is not chargeable with notice of an unrecorded and lost deed therein, when neither the grantee therein, nor those claiming under him had been in actual, open, notorious, and exclusive possession of the land for several years prior to such purchase. (p. 935.)

VENDOR AND PURCHASER—Attorney and Client—Notice of Unrecorded Deed.—A purchaser of land is not chargeable with notice of an unrecorded deed thereof by his grantor, by the knowledge of his attorney thereat, acquired before he was employed to purchase the land for such grantee, and while he was representing another person. (pp. 935, 936.)

VENDOR AND PURCHASER—Attorney and Client—Notice of Unrecorded Deed.—A bona fide purchaser of land is not chargeable with notice of an unrecorded deed thereof by his grantor, by the knowledge of his attorney, who, without the purchaser's knowledge, is also representing the vendor, and is personally interested in the sale and receives the purchase money. (p. 936.)

COTENANCY—Adverse Possession.—A cotenant cannot hold adverse possession as against his cotenants in the common property. (p. 936.)

DEEDS.—Recitals in a Statute of the names of minor children as the heirs of a certain person, authorizing them to sell their interest in land, do not of themselves overcome a recital in a deed that the persons named therein are, at the date of its execution, his only children and heirs. (p. 936.)

T. D. Ball and N. Gunn, for the appellant.

Lackland & Wilson, for the appellee.

605 **TYSON, J.** The bill in this cause was filed for the partition of lands described in it between joint owners or tenants in common thereof. Complainant claims to be the owner of a six-sevenths undivided interest, in common with the respondent, whom the bill alleged to be the owner of the remaining one-seventh. The answer of respondent denies the ownership of the complainant as alleged by him, and states the respective interest or ownership of the lands to be a six-sevenths undivided interest to belong to it, and a one-seventh to belong to complainant. After the filing of this answer, complainant amended his bill, in which he set forth the claim of title under which the respondent claims to own the six-sevenths interest. In order to complete this chain of title, an alleged unrecorded and lost or destroyed deed is necessary to be established by respondent by parol evidence. This amendment also asserts title to be in complainant to a six-sevenths interest, and avers that complainant is a bona fide purchaser without notice of the unrecorded and lost deed under and through which the respondent claims title. This amendment, and a subsequent one filed, also invoke an estoppel against one of the grantors in respondent's chain of title. Under the view we take of this case, it is unnecessary to consider the rulings of the court in this respect. For if respondent has failed to establish the execution, contents, etc., of the lost deed, or the complainant is shown to have paid value for the lands, and the respondent has failed to sustain the burden of proving notice to him, either actual or constructive, of the contents of the lost deed, if it is shown to have ever had an existence, there is no error in the decree of which appellant can complain: *Caldwell v. Pollak*, 91 Ala. 353, 8 South. 546.

Adverse possession is also relied upon by respondent to show title in the grantee to whom the lost deed was ⁶⁰⁶ made. Both parties litigant claim to have derived their respective titles from the same source, to wit, the children and heirs at law of the Wigginses. There were seven of these children, and the complainant shows a complete recorded chain of title to the interest claimed by him. While the respondent shows only a complete chain of title by the records of a one-seventh interest, it insists that John C. Wiggins, one of the seven children, acquired the title of all of his brothers and sisters, except one, by deed executed to him which was lost and never recorded. In view of the uncertainty as shown by the evidence, not only as to the signing of this alleged lost deed by all of the alleged grantors, but as to its attestation, as to some of the signatures, its acknowledgment by others and its contents, and when executed, if executed at all, it is doubtful whether the proof is sufficient to warrant us in finding that it ever existed: *Elyton Land Co. v. Denny*, 108 Ala. 553, 18 South. 561. But conceding, for the purposes of this opinion, that it was executed as contended for, the respondent must fail, for the reason that it is not shown that complainant had any notice, either actual or constructive, of it, if it was ever made, the complainant having shown that he paid value. It will be observed that complainant does not derive his title through John C. Wiggins, or by or through mesne conveyance from him. In other words, he is not a grantor in the chain of title to any portion of the six-sevenths interest claimed to be owned by the complainant. There is, therefore, no privity between them. This being true, the record of his deed to Baggett was not constructive notice that he (Wiggins) claimed to have owned a six-sevenths interest, instead of a one-seventh. And the same may be said of the record of the other deeds in respondent's chain of title: *Tiedeman on Real Property*, sec. 817 et seq.; 16 Am. & Eng. Ency. of Law, 1st ed., 800; *Gimon v. Davis*, 36 Ala. 589; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127; *Burch v. Carter*, 44 Ala. 115. What, then, is there in the facts of the case to show that complainant had actual or imputable notice that John C. Wiggins or ⁶⁰⁷ those claiming under him ever claimed to own the entire six-sevenths interest in the lands? It is true, it was attempted to be shown that Wiggins was in the possession of the lands for some years after the lost deed was alleged to

have been made to him. But the year in which this deed was executed, whether in 1870, 1871, or 1872, is not definitely shown. With the existence of the deed conceded, having shown that there was nothing upon the record to put the complainant upon notice of it, it becomes necessary to determine whether there was anything in the possession claimed under it to put the complainant upon notice. When this complainant negotiated and paid for and received his deed to the six-sevenths interest in these lands, his grantor was in possession under a complete recorded chain of title claiming to own that interest. Neither the respondent nor anyone under whom it claims to have derived title was in the open, visible, exclusive and unambiguous possession of the lands, which is essential in order for possession to operate as notice of the unrecorded deed. To go back of the purchase by complainant, when Proctor purchased these lands, no one was in the actual possession of them, nor had anyone who claimed to own them had the actual, open, exclusive and continuous possession of them for several years prior thereto, notwithstanding there were, when Baggett's tenant left them in 1879, dwelling-houses upon them and a part of the tract was tillable. So, then, there is nothing in the fact of possession to have put the complainant on notice of the unrecorded deed, or to have even excited suspicion that his grantor did not have title to the interest he claimed to own: *Wells v. American Mortgage Co.*, 109 Ala. 446, 20 South. 136; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Watt v. Parsons*, 73 Ala. 202; *Motley v. Jones*, 98 Ala. 443, 13 South. 782; *Griffin v. Hall*, 129 Ala. 289, 29 South. 783; *Wade on Notice*, sec. 296.

There is much contention in brief that complainant had notice of respondent's claim because Wilson, one of his attorneys in this case, knew it. There are two reasons why this contention cannot prevail: 1. It appears that Wilson acquired his knowledge while representing Bowden or Proctor and before he was employed ⁶⁰⁸ by complainant to purchase these lands for him; 2. The evidence shows that Wilson represented the sellers of these lands also, and was personally interested in making the sale of them to complainant. He was really the seller, and got all of the purchase money that was paid by complainant. He was, therefore, really acting for himself, in his own interest, and adversely to that of his principal, the complainant, without any knowledge on the part of the latter of his dual relation: *Pepper v. George*, 51 Ala. 190; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 South. 758, 1

Am. & Eng. Ency. of Law, 1145, 1149, 1150, and note 1 on page 1150.

It is insisted that the possession of John C. Wiggins and Baggett was adverse, and that it continued for a sufficient length of time to ripen into title, and that, therefore, respondent has a title to the six-sevenths interest in the lands claimed by it, independent of the unrecorded deed. It is entirely clear to us that the evidence is insufficient to sustain this contention—to overcome the presumption that John C. Wiggins was holding for himself and cotenants: *Jackson v. Elliott*, 100 Ala. 669, 13 South. 690; *Johns v. Johns*, 93 Ala. 239, 9 South. 419. Indeed, just how John C. Wiggins' possession could be adverse to the five-sevenths interest which he claims to have derived under the lost deed, which we have shown, if made, is ineffectual to pass title as against this complainant, and not adverse to the cotenant whose interest the complainant acquired, we are quite unable to understand. For the reason, that the theory of this contention is necessarily predicated upon the actual and exclusive possession by Wiggins of the lands. Certainly, if it was exclusive so as to ripen into title by adverse possession as to the five-sevenths which the respondent claims that it acquired title to by adverse possession, upon the same principle it would have acquired the other one-seventh interest which it is conceded is owned by the complainant, it not being shown that the heir who owned that one-seventh interest was in possession at the time that it is claimed that John C.'s possession was adverse.

609 The remaining point necessary to be noticed is the one that Emma Wiggins, if there be in existence such a person, should have been made a party respondent to the bill. This contention is based solely upon the difference in the recital of the names of the minor heirs of Stephen L. Wiggins in the act of the general assembly approved December 9, 1896, authorizing them to sell their one-seventh interest in these lands, and the recital of the names of the children and sole heirs of Stephen L. in a deed executed by them to Bowden on the eighteenth day of January, 1897. If we should hold the recitals in this legislative act to be evidence of the facts stated therein, we could not allow it to overcome the recital in the deed that the persons therein named were at the date of its execution the "only children and sole heirs of Stephen L. Wiggins, deceased," in the absence of other evidence upon this point, and

especially in face of the admission made by the pleadings, etc., in the cause.

There is no error in the record and the decree appealed from must be affirmed.

An Unrecorded Deed is ineffectual against subsequent creditors and purchasers without notice: *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215; *Price v. Wall*, 97 Va. 334, 75 Am. St. Rep. 788, 33 S. E. 599; *White v. McGregor*, 92 Tex. 556, 71 Am. St. Rep. 875, 50 S. W. 564; *Pyles v. Brown*, 189 Pa. St. 164, 69 Am. St. Rep. 794, 42 Atl. 11. It is good, however, between the parties and as to those having notice thereof, either actual or constructive: *Doran v. Dazey*, 5 N. Dak. 167, 57 Am. St. Rep. 550, 54 N. W. 1023; *Lake v. Hancock*, 38 Fla. 53, 56 Am. St. Rep. 159, 20 South. 811. Possession of a definite tract by one holding under a valid title is constructive notice of whatever interest he may hold: *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004.

The Possession of Tenant in Common is prima facie not adverse to his cotenants: *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757, and cases cited in the cross-reference note thereto; *Clark v. Parsons*, 69 N. H. 147, 76 Am. St. Rep. 157, 39 Atl. 898. But his grantee may hold adversely to them: *Sudduth v. Sumeral*, 61 S. C. 276, 85 Am. St. Rep. 883, 39 S. E. 534.

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although the judgment was obtained prior to such four months, unless the purchaser at the sheriff's sale under such *feri facias* shows that he is within the provision of such bankrupt act which protects a bona fide purchaser for value of the land of a bankrupt without notice of his insolvency or reasonable cause of inquiry, and this is a question of fact for the jury to decide. (Pa. St.) *Mencke v. Rosenberg*, 618.

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9. **CARRIERS—Negligence—Burden of Proof.**—There is a broad difference between the obligation of a carrier to a passenger and his obligation to a third person complaining of a tort, and the burden of proof, in the latter case, rests upon the complainant to establish both the injury and the negligence which caused it; whereas it is sufficient for a passenger, suing on a contract for safe carriage, to establish the contract and to show that he has not been safely set down at his destination, to throw the burden of proof on the carrier to prove an absence of negligence on his part. (La.) *Le Blanc v. Sweet*, 303.

10. **GROSS NEGLIGENCE of a Railroad Company Warrants Punitive Damages**, whenever there is such want of care as raises the presumption of a conscious indifference on the part of the company to the safety of its passengers. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

11. **CARRIERS OF PASSENGERS—Negligence—Injury to Projecting Arm of Passenger.**—It is not negligence per se for a passenger to allow his arm to slightly project from the window-sill

of the car in which he is seated, and if the projecting arm is injured through the sudden negligence of the railroad company which the passenger has no reason to anticipate, prepare for, or guard against, he is entitled to recover. (La.) *Clerc v. Morgan's etc. R. R. & Steamship Co.*, 319.

12. CARRIERS OF PASSENGERS—Negligence.—It is negligence on the part of a railroad company to place a freight-car with opening side doors on a switch connecting with the main track, so near the junction that the door, when opened, closes the space between the switch and the track, and causes such open door to strike and injure the arm of a passenger slightly projecting from the sill of a car window of a passing train. For such negligence the railroad company is liable. (La.) *Clerc v. Morgan's etc. R. R. & Steamship Co.*, 319.

13. CARRIERS OF PASSENGERS—Negligence.—While a carrier of passengers is not an absolute insurer of the passenger's safety against all the accidents and vicissitudes of travel, he is an insurer against all risks caused or increased by the negligence of the carrier when the passenger is not at fault. The negligence of the carrier in carrying passengers includes his negligence in all the departments of his undertaking. (La.) *Clerc v. Morgan's etc. R. R. & Steamship Co.*, 319.

14. CARRIERS OF PASSENGERS—Negligence.—While common carriers are not absolute insurers of passengers, it is an implied condition of railroad companies with each passenger that the latter shall not be put in jeopardy of life or limb by any fault, even the slightest of the servants of the company. (La.) *Clerc v. Morgan's etc. R. R. & Steamship Co.*, 319.

15. CARRIERS OF PASSENGERS—Test of Care Required of Passenger.—The standard by which to determine whether or not an adult passenger has failed to exercise the degree of care required of him is whether his conduct is that of a prudent, reasonable man, in possession of his ordinary senses and capabilities, placed in his situation. (La.) *Clerc v. Morgan's etc. R. R. & Steamship Co.*, 319.

16. RAILROADS—Depots—Contributory Negligence.—A mother who goes to a depot to take a train with her helpless children is not required to neglect proper attention to them and keep an active lookout for dangerous defects in the depot and pitfalls in her way caused by the negligence of the railroad company. She has the right to assume that there are none, and act on such assumption until in some manner warned of their existence. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

17. RAILROADS—Depots—Contributory Negligence.—If a passenger while trying to get her children onto the platform of a railroad depot unconsciously steps back in a hole in the platform, caused by the negligence of the company, and of which she had no previous warning, she is not guilty of contributory negligence, though if she had been walking forward toward the hole she could easily have seen it. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

18. RAILROADS—Depots—Negligence.—A passenger entering upon a railroad platform or depot is not bound to keep a lookout for defects and pitfalls, but has a right to assume that the depot is in safe repair, and, without knowledge of a defect therein, is only required to use ordinary care, such as is required of a person in case such depot is in safe repair. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

19. RAILROADS Must Keep Their Depots and approaches thereto in safe condition for passengers, otherwise they are negligent. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

20. RAILROADS—Gross Negligence—Contributory Negligence.—A railroad company is not excused from gross negligence though the act of the person injured contributed thereto, unless there was some act of negligence on the part of the latter that an ordinarily prudent person would not have been guilty of under the circumstances. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

Common Carriers, cold storage, duty of to provide for at end of destination, 302.

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temperature, duty of to maintain for goods while in transportation, 300, 301.

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CHURCHES.

See Religious Societies.

CLASS LEGISLATION.

See Constitutional Law, 12-15, 21.

CLASSIFICATION OF CITIES.

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COLD STORAGE.

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burden of proof in actions to recover for deterioration of property while in, 299.

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temperature impliedly undertaken to be maintained in, 296.

temperature, liability for changes in, 297.

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See Warehousemen.

COMMERCE.

1. CONSTITUTIONAL LAW—Interference with Interstate Commerce.—A statute imposing a penalty on common carriers for vary-

ing the route of shipment of goods as designated by the shipper is unconstitutional and void as an unlawful interference with interstate commerce, when applied to goods shipped from one state into another. (S. C.) *Lowe v. Seaboard Air Line Ry.*, 678.

2. INTERSTATE COMMERCE—Regulation of.—While a state, under its police power, may adopt regulations designed to promote domestic order, morals, health, and safety even though indirectly or remotely affecting interstate commerce, yet it cannot adopt regulations which directly trammel or burden such commerce. (S. C.) *Lowe v. Seaboard Air Line Ry.*, 678.

See Carriers; Interstate Commerce.

COMMON CARRIERS.

See Cold Storage.

CONFLICT OF LAWS.

See Homesteads; Negligence, 6.

CONSPIRACY.

See Boycott; Injunctions.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—Reasonableness of Statute.—A statute, though unreasonable cannot be declared invalid unless in conflict with constitutional provisions. (La.) *State v. Bolden*, 280.

2. CONSTITUTIONAL LAW—Statute Invalid in Part.—If the part of a statute which is unconstitutional does not enter into the life of the act, and is not essential to its being, it may be disregarded and the rest remain in force. (Mo.) *State v. Washburn*, 430.

3. THE POLICE POWER is Chiefly Regulative, and finds its basis in the maxim, "Sic utere tuo ut alienum non laedas." (Ill.) *Village of Lemont v. Jenks*, 173.

4. POLICE POWER—Taxation.—Under the police power, as a part of its regulative policy, a small fee may be imposed, but it cannot be resorted to as a taxing power. And whenever a court can see that the purpose of a regulation is primarily revenue, it will be referred to the taxing power and measured accordingly. (Ill.) *Village of Lemont v. Jenks*, 172.

5. PRACTICE—Harmless Error.—Error of the lower court in refusing to consider the constitutionality of a statute is harmless if the statute is determined to be valid upon appeal. (S. C.) *Porter v. Charleston etc. Ry. Co.*, 670.

6. CONSTITUTIONAL LAW—Pleading.—It is not necessary, in order to raise the question of the constitutionality of a statute in a pleading, to specify the section and article of the constitution with which such statute is claimed to conflict. It is sufficient if the constitutional provision infringed upon is plainly specified. (S. C.) *Porter v. Charleston etc. Ry. Co.*, 670.

7. CONSTITUTIONAL LAW—Office—Power of Appointment.—A statute giving power to a partisan political committee to name certain persons from whom the governor must name an election commissioner, is in effect conferring on such committee the power of appointment and is unconstitutional as an infringement on the power of the executive department of the state. (Mo.) *State v. Washburn*, 430.

8. CONSTITUTIONAL LAW—Appointment to Office.—A statute creating an office and naming by description the men who are to fill it is in effect creating the office and appointing the officer, or making the law and executing it, and is unconstitutional as an unlawful attempt to exercise a governmental function. (Mo.) *State v. Washburn*, 430.

9. CONSTITUTIONAL LAW—Appointment to Office—Right of. A statute giving power to a partisan political central committee to name certain persons from whom the governor must name an election commissioner is void as an unwarranted encroachment on the governor's constitutional power of appointment to office. In such case the governor's choice is not confined to the persons named by the party committee, but he may choose any other eligible person and appoint him to such office. (Mo.) *State v. Washburn*, 430.

10. CONSTITUTIONAL LAW—Appointment to Office—Special Law.—A statute conferring on the central committee of one political party only the power to name certain persons from whom the governor must appoint an election commissioner violates a constitutional prohibition against passing any local or special law granting to any "corporation, association or individual any special or exclusive right, privilege or immunity." Such statute confers a special privilege on the committee of one political party, and withholds it from the committee of all other parties. (Mo.) *State v. Washburn*, 430.

11. CONSTITUTIONAL LAW—Appointment to Office.—The Legislature may pass a statute prescribing the manner in which an appointment to an executive office shall be made, but it cannot make the appointment itself, nor authorize anyone not connected with the executive department to make it. It cannot rob the executive of the power of appointment to office by conferring it on an outside unofficial agency of its own appointment. (Mo.) *State v. Washburn*, 430.

12. CONSTITUTIONAL LAW.—A Statute Conferring Corporate Powers Upon a Single City, under a classification ineffectual for that purpose, is unconstitutional, and persons holding office thereunder may be ousted on quo warranto. (Ohio St.) *State v. Beacon*, 599.

13. CONSTITUTIONAL LAW—Classification of Cities.—Legislation evincing an intention that municipalities having substantially the same conditions and characteristics shall not enter and remain in the same class, is ineffectual to designate classified recipients of corporate power, and an act to confer such power upon a single city, by such classification, is unconstitutional. (Ohio St.) *State v. Jones*, 592.

14. CONSTITUTIONAL LAW—Class Legislation—Common Carriers.—A statute subjecting all common carriers to a penalty for failing or refusing to pay a claim for loss of or damage to any article intrusted to them for transportation within sixty days from the time when such claim is made, is not unconstitutional, as creating an unjust discrimination against, or denying the equal protection of, the law to common carriers, or as an unlawful interference with interstate commerce. (S. C.) *Porter v. Charleston etc. Ry. Co.*, 670.

15. CONSTITUTIONAL LAW—Class Legislation.—Laws which are applicable alike to all persons, natural or artificial, belonging to a given class are not violative of constitutional provisions forbidding a denial to any person of the equal protection of the laws. (S. C.) *Porter v. Charleston etc. Ry. Co.*, 670.

16. MUNICIPAL CORPORATIONS—Impounding Ordinances—Due Process of Law.—A municipal ordinance authorizing a sale of

property impounded after a judicial determination that the ordinance has been violated in permitting the property impounded to be at large, is valid. (Ky.) *Armstrong v. Brown*, 207.

17. MUNICIPAL CORPORATIONS—Impounding Ordinances—Due Process of Law.—An ordinance providing that notice shall be posted at the courthouse door for five days to the unknown owners of impounding animals, after which, on failure of such owner to appear, the police court may declare a forfeiture and render a judgment of sale, to be followed by five days' advertisement of such sale, describing the animals, prescribes a due process of law and renders a sale under such proceedings valid. (Ky.) *Armstrong v. Brown*, 207.

18. CONSTITUTIONAL LAW.—Free Speech is Essential to the Existence of Personal Liberty under a constitutional provision guaranteeing personal liberty. (Mo.) *Marks etc. Clothing Co. v. Watson*, 440.

19. CONSTITUTIONAL LAW.—The Absolute Right of the Freedom of Speech and the Press cannot coexist with the idea of preventing such freedom of speech or of the press by injunction. (Mo.) *Marks etc. Clothing Co. v. Watson*, 440.

20. CONSTITUTIONAL LAW.—The Absolute Right of Free Speech, Free Writing, and Free Publication guaranteed by the constitution can neither be impaired by the legislature, nor hampered nor denied by the courts. (Mo.) *Marks etc. Clothing Co. v. Watson*, 440.

21. CONSTITUTIONAL LAW.—Anti-trust Statutes, declaring that the provisions thereof "shall not apply to agricultural products or livestock while in the possession of the producer or raiser," are unconstitutional, as denying the equal protection of the laws of the state to all persons. (Ga.) *Brown v. Jacobs Pharmacy Co.*, 126.

22. CONSTITUTIONAL LAW.—Criminal statutes levied against acts that would be frauds without such criminal enactments, and intended for the protection of the rights of citizens, cannot have the effect of impairing the obligation of contracts or of depriving any person of his property without due process of law. (Mo.) *State v. Missouri Guarantee etc. Assn.*, 426.

23. CONSTITUTIONAL LAW—Building and Loan Associations—Insolvency.—A statute making it a felony for any officer of an mutual savings fund, loan and building association, to receive, or assent to the reception of any money or other valuable thing in payment of any premium, dues or fees due or owing to such association, after knowledge of the fact that it is insolvent or in failing circumstances, and making the failure of such association prima facie knowledge of its insolvency, is constitutional. Such statute does not impair the obligation of contracts in denying stockholders in such association, who became borrowers prior to the passage of the statute, the right to pay their premiums, nor does it deprive them of property without due process of law. (Mo.) *State v. Missouri Guarantee etc. Assn.*, 426.

See Adulteration; Carriers; Commerce; Statutes; Taxation.

CONTRACTS.

1. CONTRACTS.—The Very Existence of a Contract Requires that the minds of the parties meet, and that it be executed freely and voluntarily by all. (Utah) *Gorringe v. Reed*, 692.

2. CONTRACTS.—Mutuality of Remedy does not require that each party should have precisely the same remedy, either in form,

effect or extent, and mere difference in the rights stipulated for does not destroy mutuality of remedy. In a fair and reasonable contract, it ought to be sufficient that each party has the possibility of compelling the performance of the promises which were mutually agreed upon to constitute mutuality of remedy. (Pa. St.) Philadelphia Ball Club v. Lajoie, 627.

3. **CONTRACTS—Quantum Meruit.**—There can be no recovery on a special count based on a contract for work that is not fully executed, but a recovery for the actual value of the work done may be had upon a quantum meruit under the common counts, when failure to complete the work is without the fault of the plaintiff. (W. Va.) Barrett v. Coal Co., 802.

4. **CONTRACTS to do Work to Satisfaction of Another—Right of Rejection.**—If a person contracts to manufacture articles or do work "to the satisfaction" of another, such other is the sole judge of the quality of the work done, and his right to accept or reject it is absolute, conclusive, and binding upon the parties, without investigation of his reasons, unless he acts fraudulently. (W. Va.) Barrett v. Coal Co., 802.

5. **ILLEGAL CONTRACT.**—If any Part of an Entire Consideration for a promise, or any part of an entire promise, is illegal, the whole contract is void. (Ill.) Douthart v. Congdon, 167.

6. **DURESS—Threat of Imprisonment.**—A wife may avoid a contract obtained by threats of imprisoning her husband, and it is of no consequence whether the threat is of lawful or unlawful imprisonment. (Utah) Gorringer v. Reed, 692.

7. **EQUITY may Grant Relief from an Agreement to Stife a Criminal Prosecution**, when the public good requires it, although the parties are in pari delicto. (Utah) Gorringer v. Reed, 692.

Contracts, considerations of which are partly legal and partly illegal, 172.

CONVERSION.

See Trover and Conversion.

Conveyances. See Deeds; Husband and Wife.

CORPORATIONS.

1. **A CORPORATE OBLIGATION Need not be Signed With the Name of the Corporation**, where it appears in the body of the writing that the corporation is the obligor, and it is signed with the signature of the proper officers, with his or their official title or titles. (Wis.) City of Fond du Lac v. Otto, 830.

2. **CORPORATE EXISTENCE—Attacking in Eminent Domain.**—The legal existence of a de facto telegraph corporation cannot be questioned when it is condemning property for a right of way. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

3. **CORPORATE EXISTENCE—How May be Attacked.**—The legal existence of a de facto corporation can be questioned only by the state in a direct proceeding for that purpose. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

4. **CORPORATE STOCK.**—Dividends on Corporate stock belong to the person holding it at the time they are declared. (Utah) Clark v. Campbell, 716.

5. **CORPORATE STOCK in Escrow—Dividends.**—If mining stock is deposited under an escrow agreement that it shall pass to a certain person on the payment of a stated price within a stated time, dividends declared before the price is paid do not belong to the purchaser. (Utah) *Clark v. Campbell*, 716.

6. **CORPORATIONS DE FACTO** are Protected by the same law and governed by the same legal principles as corporations de jure, so long as the state acquiesces in their existence and exercise of corporate functions; and a private citizen whose rights are not invaded has no right to inquire collaterally into the legality of their existence. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

7. **CORPORATIONS DE FACTO—Estoppel to Deny Existence of.**—A person who contracts with a de facto corporation cannot, in a suit by the corporation on such contract, deny and disprove the rightfulness of its existence. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

8. **CORPORATIONS DE FACTO** Exist when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might have been legally incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

9. **CORPORATIONS DE FACTO—Failure to Pay License Fee.**—The failure of a de facto corporation to pay the statutory license fee for doing business does not affect its existence as such corporation, nor render its stockholders liable as partners. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

10. **CORPORATIONS DE FACTO—Liability of Stockholders.**—Paid-up subscribers to stock in a corporation de facto, who were guilty of no fraud in its organization, who never agreed to be anything but stockholders, and never consented to become partners therein, or held themselves out as such, cannot be held liable as partners. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

11. **CORPORATIONS DE FACTO—Notice of Existence.**—If incorporation papers, except the certificate of incorporation, are on file in the proper office, though not recorded, at the time a contract is entered into with the corporation, a person contracting with it is charged with constructive notice of its de facto existence. (Ala.) *Owensboro Wagon Co. v. Bliss*, 907.

12. **CORPORATIONS, Member of, When may Enforce Cause of Action in Favor of.**—A member of a corporation cannot enforce a cause of action in its favor, unless it appears (1) that those whose duty it is to act have, after request, refused to do so, or (2) that they are so concerned in the wrong sought to be redressed and hostile to any attempts to vindicate the corporate rights that it is reasonably certain that a request to proceed would be unavailing. (Wis.) *Northern Trust Co. v. Snyder*, 867.

COSTS.

COSTS—Continuance of an Action for the Purpose of Recovering.—In the cases wherein it has been decided that an action cannot be continued merely for the recovery of costs after the cause of action sued upon has been satisfied, there was a settlement of some kind between the parties after the commencement of the suit, nothing being said about costs, not a mere tender of satisfaction

not including costs up to the time of tender, or a tender not accepted. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

See Eminent Domain, 18, 19.

COTENANCY.

See Tenancy in Common.

COUNTIES.

1. COUNTY BOARDS, Power to Change Back to an Abandoned Method.—A statute authorizing a county board by a resolution to be entered on its records to change the method prescribed by law for compensating a sheriff for all services performed within the county for which it is legal to pay, and declaring that when the resolution has been adopted, the board must, at the annual meeting preceding the election of county officers, fix the salary of the sheriff in the same manner as the amount of the salaries payable to other officers are required to be fixed, does not empower such board, after a change from fees to salaries, to return to the fee system. (Wis.) *Northern Trust Co. v. Snyder*, 867.

2. COUNTY, CLAIMS AGAINST, Allowance of, When Void.—If a statute provides the manner in which claims of statements against a county must be made out, and that no claim shall be acted upon or considered by any county board unless such statement shall have been made and filed, an allowance of a claim not made out as prescribed by the statute is such a disregard of the legislative will as to give any person interested a legitimate ground of complaint. (Wis.) *Northern Trust Co. v. Snyder*, 867.

3. COUNTY, Power of, to Pay for Services Rendered Beyond the State.—A statute enumerating among the general powers of the county board the levy of taxes and the raising of such moneys as may be necessary to defray the charges and expenses incident to, or arising from, the execution of their lawful authority and of representing the county, and having the care of the county property and the management of the business and concerns of the county in all cases where no other provision shall be made, does not give such board power to authorize the payment of money for expenses incurred or services rendered outside of the state in the pursuit or arrest of criminals. (Wis.) *Northern Trust Co. v. Snyder*, 867.

4. TAXPAYERS, Right of, to Sue to Restrain Unlawful Payment of Public Moneys.—A suit to restrain officers of a county from transcending their powers and violating the organic act of the corporate body by paying out moneys to a sheriff on illegal demands may be maintained by a taxpayer suing on behalf of himself and others similarly situated without first requesting such officers to institute such suit. (Wis.) *Northern Trust Co. v. Snyder*, 867.

5. COUNTY TAXPAYERS, When may Sue to Enforce a Demand in Favor of.—A taxpayer may sue in his own behalf and in behalf of all other persons similarly situated, to restrain the county from paying certain illegal sheriff's bills, and to obtain an accounting of moneys paid to the sheriff, to which he was not entitled, when it appears that the county officers whose duty it is to maintain such a suit were the same officers who, for a long time, had been accustomed to audit and order paid the class of bills in question, and had been advised and believed that they were legal, and hence that they could not act without impeaching their own transactions. (Wis.) *Northern Trust Co. v. Snyder*, 867.

6. THE RECORDS OF A COUNTY BOARD Cannot be Supplemented by Parol Evidence of its Members to show what they intended by any of its enactments. (Wis.) *Northern Trust Co. v. Snyder*, 867.

7. DAY, COMPENSATION BY.—A "day" means a calendar day in all cases where the statute merely provides for compensation at a certain or reasonable sum per day. Neither a county board nor the courts have any right to call the work done in a calendar day any more than a day's work or service, in the absence of some statute expressly authorizing it. (Wis.) *Northern Trust Co. v. Snyder*, 867.

8. LACHES, When Will not Bar Suit.—A suit by a taxpayer to restrain the payment to a sheriff of illegal bills against the county, and for an accounting for moneys before paid upon similar bills, is not barred by laches unless there have been (1) knowledge on the part of the plaintiff of the course of dealing with the sheriff, indicating acquiescence; (2) performance of the services by the sheriff for which the alleged illegal charges were made, when he would, within reasonable probability, have omitted to do the work had he supposed in advance, or had any reasonable ground to suppose, that his right to compensation would be challenged; and (3) benefit to the corporation reasonably commensurate with the charges for the services performed. (Wis.) *Northern Trust Co. v. Snyder*, 867.

9. COUNTY OFFICERS—Acts of.—When the Statute is not Followed, the acts of a county court or of county commissioners are without force and effect. In such an event, however, it does not follow that under no circumstances can a liability be created. (Utah) *Auerbach v. Salt Lake County*, 685.

10. COUNTY WARRANTS—Evidence of Validity.—In an action on a county warrant, defended on the ground of fraud in its inception, the proceedings of the court when it was authorized, and a bond received as security for the delivery of goods for which it was issued, are admissible in evidence. (Utah) *Auerbach v. Salt Lake County*, 685.

11. COUNTY WARRANTS—Fraud in—Innocent Holder.—A county cannot, after an opportunity to rescind, retain and use goods fraudulently sold to it, and refuse to pay their value to the innocent holder of a warrant given in payment for them. (Utah) *Auerbach v. Salt Lake County*, 685.

12. COUNTY WARRANTS—Fraud in—Priority Among Holders. If county warrants are fraudulently issued in excess of the value of goods received, a recovery without deduction may be had on the first warrant issued, registered, and presented for payment, it being in the hands of an innocent holder and less in amount than the actual value of the goods. (Utah) *Auerbach v. Salt Lake County*, 685.

13. APPEAL.—An Objection that a Claim Against a County was not presented to the proper officers and acted upon as required by statute, before suing thereon, cannot be raised for the first time on appeal. (Utah) *Auerbach v. Salt Lake County*, 685.

COURTS.

1. JURISDICTION—Consent to, and Waiver of.—Jurisdiction of the subject matter of a suit cannot be conferred by consent, neither can the want thereof be waived. (Utah) *Conant v. Deep Creek etc. Irr. Co.*, 721.

2. **REAL ACTION.**—The Courts of One State are without jurisdiction to determine suits affecting the title to lands in another state. (Utah) *Conant v. Deep Creek etc. Irr. Co.*, 721.

See Statutes, 9.

CRIMINAL LAW.

1. **CRIMINAL LAW.**—There are no Common-law Crimes in Ohio. (Ohio St.) *Johnson v. State*, 564.

2. **JURY TRIAL.**—Verdict "That we, the jury, find the accused guilty of shooting with intent to kill," without specially mentioning the name of the accused, is a good and sufficient verdict. (La.) *State v. Bolden*, 280.

3. **JUDGMENT in Criminal Cases.**—Acquittal of Charge of Misdemeanor is a Bar to prosecution for perjury of the accused in securing such acquittal. (Ky.) *Cooper v. Commonwealth*, 275.

4. **RES JUDICATA.**—Judgments in Criminal Cases.—A judgment acquitting the accused under an indictment for adultery is conclusive in his favor on his trial for perjury committed on the first trial by which his acquittal was secured. (Ky.) *Cooper v. Commonwealth*, 275.

See Breach of Peace; Constitutional Law, 22, 23; Elections; Misdemeanors; Peace.

DAMAGES.

DAMAGES.—Pleading.—Unless the act complained of is alleged to have been done improperly, negligently, unlawfully, or wrongfully, it will not support an action for damages. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

See Carriers, 10; Death; Eminent Domain; Municipal Corporations; Telegraphs and Telephones.

DAY.

See Counties, 7.

DEATH.

1. **WRONGFUL DEATH.**—Elements of Damage.—In an action against a railway company, for the wrongful death of an employé, no recovery can be had for pecuniary loss by the father, who is also an employé of the defendant, if his negligence contributed to the accident. (Ohio St.) *Cleveland etc. Ry. Co. v. Workman*, 602.

2. **NEGLIGENCE.**—Damages—Measure of for Death.—The surviving parents of a girl, sixteen years of age, who was drowned through the negligence of a carrier, may recover as damages expenses incurred in finding and burying the body, loss of services and filial offices, and the amount which the daughter herself was entitled to recover at the moment of her death. (La.) *Le Blanc v. Sweet*, 303.

DEEDS.

1. **DEEDS.**—Execution and Delivery.—When a grantor, after duly signing and attesting a conveyance, files it in the probate office for record, it constitutes a sufficient delivery, completing the execution and delivery of the instrument. (Ala.) *Gulf Red Cedar Lumber Co. v. O'Neal*, 22.

2. **DEEDS—Delivery.**—The Acceptance of a deed by the grantee is a constituent element of its delivery. (Ill.) *Brady v. Huber*, 161.

3. **DEEDS—Delivery.**—The Recording of a deed raises a presumption of its delivery. (Ill.) *Brady v. Huber*, 161.

4. **DEEDS—Delivery Conclusively Presumed from Recording.**—If a father, with the consent of his daughter, executes a deed to her and records it, to place his property beyond the reach of creditors, he is concluded by the presumption of delivery arising from the recording. (Ill.) *Brady v. Huber*, 161.

5. **DEEDS.**—Recitals in a Statute of the names of minor children as the heirs of a certain person, authorizing them to sell their interest in land, do not of themselves overcome a recital in a deed that the persons named therein are, at the date of its execution, his only children and heirs. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

See Alteration of Instruments; Mortgages; Vendor and Vendee.

Definition of "and," 733.

of "boycott," 451.

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of "nephew," 468.

of "or," 733.

of "tax," 172, 176.

DEPOTS.

See Carriers, 16-19.

DESCENT AND DISTRIBUTION.

1. **PARTITION.**—A Judgment Creditor Who, at a Sheriff's Sale, Purchases the Undivided Interest of his judgment debtor in land belonging to a decedent's estate, is not entitled to a partition of such land, where the judgment debtor owed the estate for more than his inherited share is worth, and is insolvent. (Mo.) *Ayres v. King*, 452.

2. **DESCENT AND DISTRIBUTION.**—On the Death of an Intestate, His Lands Descend Directly to the Heir, subject to the right of the personal representative to subject them to the payment of debts. (Ala.) *State v. Williams*, 17.

3. **ESTATES OF DECEDENTS.**—The Indebtedness of a Legatee or Distributee to an estate constitute assets of the estate to be deducted from such legacy or distributive share. (Mo.) *Ayres v. King*, 452.

4. **REVIVOR.**—One Who has Acquired the Title to Lands of the Heirs of an Intestate by purchase under a decree of sale of the probate court for partition may, in proceedings to revive an order of sale of such property, interpose any defense available to the heirs. (Ala.) *State v. Williams*, 17.

DETINUE.

1. **DETINUE—Ownership—Cotenancy.**—Parties plaintiff, to recover in an action of detinue, must have an interest severally in the thing sued for, and if a third person, not a party to the suit, is a joint owner with them in such property, they cannot recover,

although he has left the state, or declined to allow the use of his name as a party plaintiff. (Ala.) *Bolton v. Cuthbert*, 914.

2. **DETINUE—Ownership—Indemnity.**—An action of detinue for the recovery of property owned in cotenancy may be prosecuted by one cotenant in the name of all without the consent of the other co-owners, upon indemnifying them against costs. (Ala.) *Bolton v. Cuthbert*, 914.

3. **DETINUE—Ownership.**—Objection that plaintiffs in an action of detinue do not own the entire interest in the property sued for may be raised under the plea of the general issue, and there is no necessity for a plea in abatement. (Ala.) *Bolton v. Cuthbert*, 914.

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1. **A DECREE FOR ALIMONY** may be Enforced by an Attachment for Contempt, even in the absence of statutory authority. (Wash.) *In re Cave*, 736.

2. **ALIMONY—Imprisonment for Debt.**—A decree for alimony in a divorce proceeding is not a debt, within the meaning of a constitutional provision, prohibiting imprisonment for debt. (Wash.) *In re Cave*, 736.

3. **ALIMONY—Jurisdiction.**—A Court has Authority to Punish for Contempt by immediate imprisonment where the person was personally before the court at the time the order to pay alimony was made, had the money in his possession at the time, and refused to comply with the order. (Wash.) *In re Cave*, 736.

4. **JURISDICTION—Divorce—Alimony.**—While no express statutory authority is found for permanent alimony by that name after divorce, yet under a statute authorizing a court to make such disposition of the property of the parties as is just and equitable, it may require a stipulated sum to be paid monthly, or payment to be made in one lump sum. (Wash.) *In re Cave*, 736.

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ELECTIONS.

1. **ELECTIONS.**—Statutory Provisions Relating to Procedure in elections are directory merely, unless their disregard be made expressly vitative. (Ala.) *Patton v. Watkins*, 43.

2. **CRIMINAL LAW.**—In a Prosecution for Fraudulently Personating a Voter, the state must prove that the person whom the defendant is charged with personating was a qualified voter at the time of such alleged personation. (Mo.) *State v. Nolan*, 466.

3. **EVIDENCE.**—As Against One Who is Charged with Personating a Voter, an Election Register is not sufficient proof that the person whom he is charged to have fraudulently represented himself to be was a qualified elector at the time of such personation. (Mo.) *State v. Nolan*, 466.

4. **OFFICE.**—Election Commissioners are state officers, and exercise powers properly belonging to the executive department of the state government, and must trace their right to office to that department. (Mo.) *State v. Washburn*, 430.

5. **ELECTIONS.**—Under a Statute Allowing Illiterate Voters the assistance of an official marker to prepare their ballots, on making oath of their disability, the fact that no oath is taken is not such an irregularity as will make the vote illegal, if in fact the disability existed. (Ala.) *Patton v. Watkins*, 43.

6. **ELECTIONS.**—Illegal Votes.—Where a Statute Allows Illiterate Voters the assistance of an official marker to prepare their ballots, the marker is prohibited from exercising any discretion in selecting candidates for the voter assisted, and the substitution of his own for the voter's choice will render such ballots void. (Ala.) *Patton v. Watkins*, 43.

7. **ELECTIONS.**—Dereliction in Respect of Official Duty pertaining to an election may render the culpable officer amenable to penal laws without affecting the validity of the votes cast. (Ala.) *Patton v. Watkins*, 43.

8. **ELECTIONS.**—Irregularities.—The fact that no booths were provided for the occupation of voters while preparing their ballots, or that the polls were closed during the noon hour, are not such irregularities in conducting an election as will render the votes invalid. (Ala.) *Patton v. Watkins*, 43.

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EMINENT DOMAIN.

1. **EMINENT DOMAIN**—Description of Property.—A Complaint in an action by a telegraph company against a railroad company to condemn a right of way, alleging that the property is a railway running between certain termini within certain counties, and setting forth the amount of ground needed for each pole, and the distance of the poles from one another and the railway track, sufficiently describes the way desired. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

2. **EMINENT DOMAIN**.—A Corporation's Discretion in Selecting Land under the power of eminent domain will not be interfered with,

unless it acts in bad faith or is guilty of oppression. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

3. **EMINENT DOMAIN—Evidence.**—In an Action by a Telegraph company against a railroad company to condemn a right of way, the certificate of the postmaster general showing the acceptance of the act of Congress, whereby such companies are given the right to erect lines on post roads, is admissible in evidence. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

4. **EMINENT DOMAIN—Necessity of Taking.**—When a railroad company refuses a bona fide offer to negotiate for the use of land in its right of way for a telegraph line, a necessity exists for the taking thereof, though there may be other land available. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

5. **EMINENT DOMAIN.—The Necessity or Expediency** of appropriating any particular property, when the use is public, is not a subject of judicial cognizance. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

6. **EMINENT DOMAIN—Property Devoted to Public Use.**—A Telegraph company may construct its line on a railroad's right of way, in the absence of legislative authority, where the use of the land for railway purposes is not thereby materially interfered with. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

7. **EMINENT DOMAIN—Property Devoted to Public Use.**—The right of way of a railroad, not essential to the employment of its franchises and property, may be appropriated for a telegraph line. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

8. **EMINENT DOMAIN.—Property Lying in Several Counties** may be condemned for a telegraph line by one proceeding in one of the counties. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

9. **EMINENT DOMAIN.—The Fact that a Foreign Corporation** is interested in a corporation organized under the laws of the state to construct a telegraph line does not affect the latter's right to condemn a right of way. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

10. **EMINENT DOMAIN—Compensation.**—A Telegraph Company, condemning a railroad's right of way for its line, must make compensation therefor, to be ascertained under the state laws. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

11. **EMINENT DOMAIN—Elements of Damage.**—When a railroad's right of way is condemned for a telegraph line, damages from the added expense of burning grass from the way by reason of the erection of the poles are too remote to be allowed. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

12. **EMINENT DOMAIN—Measure of Damages.**—When a railroad's right of way is condemned for a telegraph line, the measure of damages is the decrease in the value of such way for railroad purposes. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

13. **EMINENT DOMAIN—Nominal Damages.**—The damages to be paid a railroad company, when its right of way is condemned for a telegraph line are nominal. (Utah) Postal Tel. etc. Co. v. Oregon Short Line etc. Co., 705.

14. **EMINENT DOMAIN.—The Place of Deposit of Money** Required to be Made by the Plaintiff seeking to acquire property by proceedings for its condemnation is, by the statutes of Wisconsin,

with the clerk of the county wherein the proceedings are commenced, irrespective of the county in which they were tried or the judgment rendered. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

15. EMINENT DOMAIN—Title to Moneys Deposited Pending an Appeal.—If a statute authorizes a railway corporation to pay into court the amount awarded by commissioners, and thereupon to take and use the land for the purpose for which it was condemned, the corporation has not thereafter any title to, and cannot claim, such money, though the statute further provides that if the corporation appeals, the land owner cannot withdraw the money without first giving a bond to protect the corporation from loss in the event of the final reduction of the award. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

16. EMINENT DOMAIN.—Until the Full Amount to Which a Land Owner is Entitled, Including Costs Incurred by Him, is paid to him, or into court for his benefit, he is justified in not taking any money deposited, and in standing on his strict legal rights and demanding interest on the judgment in the condemnation action until tender of the full amount to which he is entitled in payment thereof. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

17. EMINENT DOMAIN.—The Manner in Which a Tender or Payment is Required to be Made to a land owner in proceedings to deprive him of his property is regulated by statute, and not by the common-law rules respecting tender of payment. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

18. EMINENT DOMAIN—Costs in Collecting the Award.—If, after an award in favor of a land owner, he necessarily incurs expenses in an unavailing attempt to collect the amount of the award, such expenses form part of the compensation which must be paid or tendered to him before he can be deprived of his property. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

19. EMINENT DOMAIN—Costs Incurred by Land Owner.—The compensation to be awarded a land owner in proceedings to acquire his property by the exercise of the right of eminent domain must include all necessary expenses incurred by him in the enforcement of his rights, which are taxable according to law. It must not be diminished by any costs reasonably incurred in condemnation proceedings, or in collecting the award which are taxable in favor of the prevailing party in an action or proceeding to make his judicial remedy available. (Wis.) *Stolze v. Milwaukee etc. Ry. Co.*, 833.

EQUITY.

1. EQUITY.—The Fact that there is no Remedy at Law does not necessarily and of itself give a court of equity jurisdiction to afford relief. (Mo.) *Marks etc. Clothing Co. v. Watson*, 440.

2. EQUAL EQUITIES.—Where Parties Who Hold Claims against property are equal equitably, the one who holds the legal title to the property should prevail. (N. J. Eq.) *Forman v. Brewer*, 475.

3. EQUITY may Grant Relief from Unlawful Transactions, if public policy so requires, when the parties, though in delicto, are not in *pari delicto*. (Utah) *Gorringer v. Reed*, 692.

See Contracts, 7.

ESCROW.

ESCROW—Necessity of Contract.—The deposit of mining stock, with a writing authorizing its purchase by a certain person
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for a stated price within a stated time, is not binding as an escrow, though so styled, if there is no binding contract therefor between the parties. (Utah) *Clark v. Campbell*, 716.

See Corporations, 5.

ESTATES OF DECEDENTS.

See Descent and Distribution; Executors and Administrators.

ESTOPPEL.

1. **ESTOPPELS, to be Binding, Must be Mutual.** (Ala.) *State v. Williams*, 17.

2. **ESTOPPEL.**—A Representation as to the Future can operate as an estoppel only when it relates to an intended abandonment of an existing right. (Utah) *Elliot v. Whitmore*, 700.

Estoppel of wife as against husband's creditors to claim property which has stood in his name, 524, 525.

EVIDENCE.

1. **EVIDENCE**—Judicial Notice.—Municipal Charters are public acts of which courts take judicial notice. (Ala.) *Arndt v. City of Cullman*, 922.

2. **EVIDENCE**—Proof of Ordinance.—It is error to permit parol proof of the passage of an ordinance. (Ohio St.) *Cleveland etc. Ry. Co. v. Workman*, 602.

3. **EVIDENCE.**—Letters admitted in evidence without objection may be taken as the beginning of proof of a certain fact. (La.) *Marks v. New Orleans Cold Storage Co.*, 285.

4. **EVIDENCE**—Book of Rules of Railroad.—It is error to send to a jury a book of rules of a railroad company, to be used in their deliberations when only a few of the rules have been offered in evidence. (Ohio St.) *Cleveland etc. Ry. Co. v. Workman*, 602.

5. **PAROL EVIDENCE** is not Admissible to Prove What the Members of a Legislative Body Meant or Intended by any of its resolves or by-laws. (Wis.) *Northern Trust Co. v. Snyder*, 867.

6. **EVIDENCE**—Secondary, When Admissible.—After the admission of evidence to show the loss of notes by fire, secondary evidence as to their contents is admissible. (S. C.) *Hunter v. Hunter*, 663.

7. **EXPERT MEDICAL Evidence** that the diseased condition of a certain person is due to a shock to the spinal column is admissible. (W. Va.) *Barker v. Ohio River R. R. Co.*, 808.

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EXECUTIONS.

1. **EXECUTION SALES**—Authority of Sheriff.—Under statutory authority a sheriff has power to sell land situated in his county

under a writ of execution issuing out of the court of common pleas of another county. (Pa. St.) *Mencke v. Rosenberg*, 618.

2. **EXECUTION SALES of Personal Property en Masse** can rarely be justified. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

3. **EXECUTION SALES of Personal Property—Notice.**—A sale of personal property under execution by an officer, without previously giving the notice of sale required by statute, renders the officer a trespasser from the beginning, and not entitled to the protection of his writ. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

4. **EXECUTION SALES of Personal Property** should always take place at or near the place where the property is when sold, in order that bidders may see and examine it. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

5. **EXECUTION SALES of Personalty—Improper Expense.**—A charge for taking and typewriting an inventory of personalty attached and sold is not a legitimate expense to be charged by the officer making the sale. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

6. **EXECUTION SALES of Personalty—Place of Sale—Notice.**—A sale by an officer of personal property under execution at a place other, different, and remote from, the place at which it is advertised to be sold is a sale without legal notice, rendering the officer a trespasser ab initio, and depriving him of the protection of his writ. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

7. **EXECUTION SALES—Sheriff's Deeds—Conclusiveness of Acknowledgment of.**—If land is sold by a sheriff under a testatum fieri facias, and his deed therefor is duly acknowledged, its validity cannot be attacked as against the purchaser by the trustee in bankruptcy of the defendant in execution, on the ground that the fieri facias has not been delivered to the clerk of the county where the land is situated, and by him recorded as required by statute. The failure to record the writ is a mere irregularity, cured by the acknowledgment of the deed. (Pa. St.) *Mencke v. Rosenberg*, 618.

8. **EXECUTION SALES—Sheriff's Deeds—Conclusiveness of Acknowledgment of.**—The acknowledgment of a sheriff's deed is a judicial act, and concludes all mere irregularities, however gross, in the process and sale, and, after such acknowledgment, the validity of the title acquired by the purchaser cannot be questioned in a collateral action, except for the absence of authority, or the presence of fraud in the sale. (Pa. St.) *Mencke v. Rosenberg*, 618.

9. **EXECUTIONS—Possession of Defendant—Presumption—Liability of Officer.**—If property levied on by an officer under execution is in the possession of the defendant therein, it is presumptively his, and the officer, if he knows nothing to rebut such presumption, cannot be charged as guilty of a conversion, unless after notice that it belongs to another, he insists upon retaining possession and proceeds with the sale, in which case he is liable to the true owner in trespass or trover. (Ala.) *Pilcher v. Hickman*, 930.

10. **EXECUTIONS—Right to Demand Indemnity.**—If property levied on by an officer under execution is in the possession of the defendant therein, it is presumptively his, and the officer, in the absence of notice of anything to rebut such presumption, has no right to demand indemnity or refuse to make the levy, or release it when made upon the refusal of the plaintiff to indemnify him. (Ala.) *Pilcher v. Hickman*, 930.

11. **EXECUTION SALES—Violation of Process—Parties Who may Question.**—Creditors of a debtor whose property has been sold under

execution in an action to which they were not parties may maintain a suit to set aside a mortgage on the property as fraudulent, and, as incident to the setting aside of the mortgage and without disputing the attachment liens growing out of such former action, to hold the officer and the plaintiff in attachment liable for the value of the property above the attachment liens, because of violation of process. (Ala.) *Brock v. Berry, Demoville & Co.*, 896.

See Exemptions.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS—Limitation of Actions.**—An executor under certain circumstances, may pay debts of the testator barred by limitation after his death. (S. C.) *Hunter v. Hunter*, 663.

2. **EXECUTORS AND ADMINISTRATORS—Power to Carry on Business of Testator.**—A testator may, by his will, empower his executor to carry on the business in which he is engaged at the time of his death, and when he does so he subjects the assets of his estate to debts contracted for that purpose. Whether liability for the trade debts of an executor extends to the entire estate, or is limited to a specific fund, depends upon the authority conferred upon the executor by the will. (Pa. St.) *Furst v. Armstrong*, 653.

3. **EXECUTORS AND ADMINISTRATORS—Power to Carry on Business of Testator.**—If a testator, by will, gives his executor unlimited power to carry on his business after his death, without placing any limitation on or designating any specific fund to be used for that purpose, the executor may subject the general assets of the estate to liability for trade debts contracted by him, and is not limited to the capital invested in the business at the time of the testator's death, and if the widow of the testator does not elect to take against the will, her share of the estate is liable with the other assets for such trade debts. (Pa. St.) *Furst v. Armstrong*, 653.

4. **EXECUTORS AND ADMINISTRATORS.—As Against the Heir,** the Lands of an Intestate cannot be sold by an administrator to pay debts, unless there exist at the time of the sale valid subsisting demands against the intestate, and an insufficiency of personal property to satisfy them. (Ala.) *State v. Williams*, 17.

5. **EXECUTORS AND ADMINISTRATORS—Sale of Land.—The Insufficiency of Personal Property to Pay the Debts** of an intestate is a condition precedent to the exercise by an administrator of a power to sell the land for such purpose. (Ala.) *State v. Williams*, 17.

6. **SUBROGATION—Sale of Land Under Defective Power.**—If lands impressed with the burdens of the testator's debts, the support of the testator's wife and children, and the education of such children, are sold by the executrix under a defective power, the purchasers are entitled to retain possession until the purchase money paid by them, which has been applied, either directly or indirectly, to the removal of such burden, has been refunded. (S. C.) *Hunter v. Hunter*, 663.

7. **RES JUDICATA.**—A Decree of Sale of a Probate Court of an Intestate's Lands for the payment of debts, upon the petition of an administrator, is not res judicata as to the validity of the debts and the insufficiency of personal property to pay them as against the heir or his successor in interest, who may contest a motion to revive such order of sale upon the ground that the debts are barred by the statute of limitations. (Ala.) *State v. Williams*, 17.

See Descent and Distribution.

EXEMPTIONS.

EXEMPTIONS—Tailor.—Under a statute exempting from execution the tools and instruments of a mechanic “used to carry on his trade for the support of himself and family,” the tools and instruments of a tailor are exempt, although he is neither a householder nor the head of a family, where such an intention appears from the entire exemption law. (Wash.) *Geiger v. Kobilka*, 733.

EXPERT EVIDENCE.

See Evidence, 7.

Felony, unintentional killing in an attempt to commit, 575, 578, 579.

FENCES.

NEGLIGENCE, CONTRIBUTORY, in Exposing Livestock to Barbed-wire Fence.—In an action by one land owner against another to recover for injuries to the livestock of the plaintiff from a barbed-wire fence between their lands, he cannot recover if guilty of contributory negligence, and he must be adjudged so guilty if he turned his stock into a pasture adjoining the fence, knowing that it was in a dangerous condition and likely to inflict the injury of which he complained. (Wis.) *Ray v. Stuckey*, 844.

Firearms, unintentional killing of a human being by the reckless use of, 581-583.

FIRES.

See Railroads.

FIXTURES.

1. **FIXTURES—License to Erect Structure.**—If a structure is placed upon the land of another, to be used by the builder during the pleasure of the land owner, the ownership of the structure remains in the builder with a right to remove it when the license is revoked. This is true, though part of the structure is under ground, and does not become a part of the realty as a fixture, unless, after reasonable notice to remove it, it is suffered to remain, and then it may be treated as abandoned by the builder. (Me.) *Salley v. Robinson*, 410.

2. **FIXTURES—Pipe Line—Liability for Cutting and Appropriating.**—If a pipe line is placed upon the land of another under a license to be used by the builder during the pleasure of the land owner, the ownership of the pipe line remains in the builder until the license is revoked, and if the land owner, without notice to the builder, or request to remove, cuts the pipe, depriving the builder of his supply of water, and takes the whole flow to himself, through the agency of the pipe line, he is liable therefor to the builder of the pipe line. (Me.) *Salley v. Robinson*, 410.

Fixtures, placing buildings on land under an agreement that they shall remain personal property, 412.

FOOD.

See Adulteration.

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FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCE—Trust to Reconvey.—If one conveys property in fraud of his creditors, courts will not enforce a parol promise by the grantee to hold it in trust for the grantor. (Ill.) *Brady v. Huber*, 161.

2. FRAUDULENT CONVEYANCES—Subsequent Insolvency.—A deed made by a grantor, when he is entirely solvent, to his infant children, may be fraudulent and void as to subsequent creditors who have no knowledge thereof, where such deed was never delivered or recorded, the grantor retained dominion over it, and it was kept off the records for the purpose of enabling him to incur indebtedness on the strength of his supposed ownership. (Mo.) *Rouse v. Caton*, 456.

3. FRAUDULENT CONVEYANCE.—A Creditor, Who Sues His Debtor, attaches property fraudulently conveyed, and purchases it at execution sale, acquires a good title as against the grantees and other creditors, and a conveyance by him to the grantees in the fraudulent deed gives them good title. (Mo.) *Gleitz v. Schuster*, 461.

4. FRAUDULENT CONVEYANCES.—A Creditor Whose Claim has been Allowed by an Administrator may maintain a bill to set aside a fraudulent conveyance of land by the intestate. (N. J. Eq.) *Adoue v. Spencer*, 484.

5. FRAUDULENT CONVEYANCE.—The Law Provides no Remedy to either of the parties to a fraudulent conveyance, if in *pari delicto*, either to disturb or enforce the conveyance. (Ill.) *Brady v. Huber*, 161.

6. FRAUDULENT CONVEYANCE.—Where a Husband Receives and Uses the Principal of His Wife's Separate Estate, to establish the fraudulent character of a conveyance by him to her, as against creditors, the burden is upon the creditors to show that such taking and use was by gift from the wife and not by loan. (N. J. Eq.) *Adoue v. Spencer*, 484.

7. A CONVEYANCE BY A HUSBAND to His Wife as security for an indebtedness due from him to her by reason of moneys from the principal of her separate estate which he had appropriated to his own use must be treated as a mortgage, and his creditors have an equity in such property beyond the amount justly due to the wife. (N. J. Eq.) *Adoue v. Spencer*, 484.

8. FRAUDULENT CONVEYANCE.—A Wife to Whom Property has been Conveyed by Her Husband is, as against his creditors, entitled to be allowed for all expenses for betterments and taxes which she may have paid, less rents received since the conveyance. (N. J. Eq.) *Adoue v. Spencer*, 484.

9. HUSBAND AND WIFE—Conveyances.—As against the creditors of a husband, the burden rests upon the wife to establish the consideration of a conveyance to her from him. (N. J. Eq.) *Adoue v. Spencer*, 484.

10. FRAUDULENT CONVEYANCE—Deed to Children.—Where a Father Honestly Owes his children a large amount, the fact that he deeds property to them, the value of which exceeds such amount will render the children liable to their father's creditors, if at all, only for the excess, there being no fraudulent intent on their part. (Mo.) *Gleitz v. Schuster*, 461.

11. FRAUDULENT CONVEYANCE—Intent.—If Children Who Receive a Conveyance from their father for an alleged debt are conscious that a portion of the debt is fictitious, they are chargeable with the fraudulent purpose of their father, and the whole transaction is void as to creditors. (Mo.) *Gleitz v. Schuster*, 461.

12. FRAUDULENT CONVEYANCE.—The Fact that Children Allow Their Father to Use the Rents of property for himself after he has conveyed it to them does not show a fraudulent intent, where such rents amount to only a small sum, and the father is old and incapable of doing any work, and had nothing to live on. (Mo.) *Gleitz v. Schuster*, 461.

13. FRAUDULENT CONVEYANCE.—Where a Father Deeds Property to His Children for a debt due them, the fact that he goes back forty years to bring up old gifts of small amounts to show an indebtedness equal to the value of the property is evidence of a fraudulent intent. (Mo.) *Gleitz v. Schuster*, 461.

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GARNISHMENT.

1. GARNISHMENT.—Trustee Process, Though in Form of Action at Law, is in substance an equitable proceeding to determine the ownership of a fund in dispute, especially when a claimant has appeared, and become a party to the suit. (Me.) *Harlow v. Bartlett*, 346.

2. GARNISHMENT.—Equitable Considerations must prevail as between plaintiff and defendant in trustee process, so far as the nature of the process will permit. (Me.) *Harlow v. Bartlett*, 346.

GAS.

GAS—Liability for Explosion of.—If a tenant opens the service pipe of a gas company and knowingly permits it to remain open and the gas to escape, and then causes an explosion by carelessly igniting such gas, his landlord cannot recover from the company the resulting damages, although such company was negligent in not having cut the gas off from the service pipe. (W. Va.) *Creel v. Charleston Natural Gas Co.*, 772.

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HABEAS CORPUS.

HABEAS CORPUS.—Any Error Committed in Decreeing Alimony in an action for divorce cannot be reviewed in habeas corpus proceedings. (Wash.) *In re Cave*, 736.

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HOMESTEAD.

1. **HOMESTEAD.**—It Requires Both Ownership and Occupancy to constitute a homestead. (Mo.) *Rouse v. Caton*, 456.

2. **HOMESTEAD.**—No Head of a Family can have Two Homesteads at the same time. (Mo.) *Rouse v. Caton*, 456.

3. **HOMESTEAD.**—A Husband and Wife while living together cannot each have a separate homestead at the same time. (Mo.) *Rouse v. Caton*, 456.

4. **HOMESTEADS**—Acquisition by Sale of Homestead in Another State.—A homestead acquired in one state with the proceeds of a sale of a homestead, in another is subject to the payment of debts accruing prior to the filing for record of the deed to the homestead last acquired. (Mo.) *State Bank of Eagle Grove v. Dougherty*, 422.

5. **HOMESTEADS**—Extraterritorial Effect of Statute.—A statute referring to the acquiring of one homestead with the proceeds of the sale of another refers exclusively to homesteads within the state of the enactment of the statute. (Mo.) *State Bank of Eagle Grove v. Dougherty*, 422.

6. **HOMESTEADS**—Extraterritorial Effect of Statutes.—The right of homestead is purely a creature of statute. Such statutes can have no extraterritorial force, and must be construed to apply to homesteads solely within the state of the enactment of the statute. (Mo.) *State Bank of Eagle Grove v. Dougherty*, 422.

7. **HOMESTEAD**—Title in Wife's Name.—Land is none the less a homestead because the title thereto is taken in his wife's name, if the purchaser declared he intended it to be such at the time he purchased it. (Mo.) *Rouse v. Caton*, 456.

8. A **HOMESTEAD** may be Abandoned by the owner moving elsewhere with his family and occupying other land which he declares to be his homestead. (Mo.) *Rouse v. Caton*, 456.

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HOMICIDE.

1. **HOMICIDE**—Murder—Manslaughter—Death of Abandoned Child from Exposure.—It is a felony for a parent to willfully abandon a helpless child on a cold, raw night and leave it to die from exposure, no matter what the purpose in so leaving it is. If the intent is to kill the child, the crime is murder, but if the act is done with the hope that the child will be rescued or taken care of by some other person, and its death results from the exposure, the crime is voluntary manslaughter. (Ky.) *Gibson v. Commonwealth*, 230.

2. **STATUTES**—Construction of.—A statute making it a crime to shoot a person with intent to kill, without making reference to

specific intent, must be construed with reference to legal principles, and so as not to cut off the right of self-defense. (La.) *State v. Bolden*, 280.

3. HOMICIDE in Commission of Unlawful Act.—To constitute an unintentional homicide, in the commission of an unlawful act, manslaughter, the "unlawful act" must be an act prohibited by the statute law, and not merely an act of gross negligence. (Ohio St.) *Johnson v. State*, 564.

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HUSBAND AND WIFE.

1. HUSBAND AND WIFE—Support of Wife Independent of Divorce.—Equity may, in a proper case, enforce in favor of a wife a claim for her support out of the estate of her husband, without and independently of proceedings for a divorce. (Ala.) *Pearce v. Pearce*, 901.

2. A HUSBAND MAKING EXPENDITURES in the Improvement of His Wife's separate estate raises a presumption that it was intended as a gift to her, in the absence of proof to the contrary. (N. J. Eq.) *Selover v. Selover*, 478.

3. HUSBAND AND WIFE—Settlement—Presumption.—A conveyance by a husband to his wife, which does not express any trust, raises a legal presumption, in the absence of proof to the contrary, that a settlement upon the wife was intended. (N. J. Eq.) Selover v. Selover, 478.

4. EVEN AT COMMON LAW, a Wife in Equity Might Have a Separate Estate over which she had the *jus disponendi* as if she were a *feme sole*. (N. J. Eq.) Adoue v. Spencer, 484.

5. GIFTS BETWEEN HUSBAND AND WIFE.—From the Receipt by a Husband of the Income of his wife's separate property, with her consent, a gift may be implied. (N. J. Eq.) Adoue v. Spencer, 484.

6. GIFT by Wife to Husband.—The Mere Possession by a Husband of the principal of his wife's separate estate will not imply a gift. (N. J. Eq.) Adoue v. Spencer, 484.

7. IF IT IS CLEAR that a Husband has Taken the Principal of His Wife's Separate Estate, with or without her consent, but without an express gift or clearly implied intent to give, equity should hold it not a gift. (N. J. Eq.) Adoue v. Spencer, 484.

8. PROPERTY Coming to a Wife by Gift, Devise or Descent is Separate Property. (N. J. Eq.) Adoue v. Spencer, 484.

9. SEPARATE PROPERTY.—A Voluntary Conveyance of Community Property by a husband to his wife is good, and makes it her separate property. (N. J. Eq.) Adoue v. Spencer, 484.

10. THE RIGHT OF A HUSBAND to the Sole Management of His Wife's Separate Property, conferred by statute, gives no right to divert such property to his own use. (N. J. Eq.) Adoue v. Spencer, 484.

11. WHERE THE PRINCIPAL OF THE SEPARATE PROPERTY of a Married Woman Comes into Her Husband's Possession, the law will not presume that it was a gift to him, and the burden is upon him to establish that it was a gift. (N. J. Eq.) Adoue v. Spencer, 484.

12. UNDER THE MARRIED WOMEN'S ACTS, Where a Husband Takes the Principal of Property which comes to his wife by gift, devise or descent, he takes it charged with a trust to administer it for his wife. (N. J. Eq.) Adoue v. Spencer, 484.

13. WIFE'S SEPARATE PROPERTY.—A Husband may Convey Property to His Wife in Texas in payment of money previously used by him, and thereby make the property so conveyed her separate property. (N. J. Eq.) Adoue v. Spencer, 484.

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INJUNCTION.

1. CONSPIRACY—Combinations in Trade—When Unlawful—Injunction.—A combination of dealers in certain merchandise to compel another dealer therein to sell at prices fixed by it, or, upon his refusal, to prevent its members, who are purchasing customers, from selling goods to him, is opposed to public policy and void. One or all of the members of such combination may be restrained from carrying into effect such purpose of the combination. (Ga.) *Brown v. Jacobs Pharmacy Co.*, 126.

2. BOYCOTT.—Equity Cannot Enjoin a Peaceable Boycott of employers by a labor union, where there is no intimidation through

fear of personal violence, or of the destruction of property, nothing but the mere abstaining from business relations with them and the persuasion of others to do likewise. (Mo.) Marks etc. Clothing Co. v. Watson, 440.

3. INJUNCTION AND FREE SPEECH.—Wherever the Authority of Injunction Begins, there the Right of Free Speech, free writing, or free publication ends. (Mo.) Marks etc. Clothing Co. v. Watson, 440.

4. INJUNCTION—Free Speech—Poverty.—Under a constitutional provision giving every person the right to say, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty, an injunction cannot be granted against one exercising such right on the ground that he has no property. (Mo.) Marks etc. Clothing Co. v. Watson, 440.

5. INJUNCTION Against Breach of Contract for Personal Services—Mutuality of Remedy.—A contract of employment of a baseball player for a season, giving the employer a right of renewal of the contract for three succeeding seasons by notice given before the close of each season, and providing for the termination of the contract on ten days' notice, and that the employé may be enjoined from playing with another during the continuance of the contract, these provisions being declared part of the consideration for the contract to pay the stipulated salary, is not wanting in mutuality of remedy, or unreasonable so as to prevent enjoining the breach of the contract, it having been in part performed, and the employer being desirous of its continuance. (Pa. St.) Philadelphia Ball Club v. Lajoie, 627.

6. INJUNCTION Against Breach of Contract for Personal Services.—If the negative remedy of injunction against a breach of contract will do substantial justice between the parties by obliging the employé either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it. (Pa. St.) Philadelphia Ball Club v. Lajoie, 627.

7. INJUNCTION Against Breach of Contract for Personal Services.—If one person agrees to render personal services to another which require and presuppose a special knowledge, skill, and ability in the employé, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of a court of equity, its performance will be negatively enforced by enjoining its breach. The damages for the breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same services in the labor market, and proof of impossibility of obtaining equivalent service is not a prerequisite to relief. This rule is here applied to a contract for services by a baseball player. (Pa. St.) Philadelphia Ball Club v. Lajoie, 627.

8. INJUNCTION Against Breach of Contract.—If, owing to special features, a contract involves peculiar convenience or advantages, or where the loss would be a matter of uncertainty, the breach thereof may be deemed to cause irreparable injury, and may therefore be enjoined. (Pa. St.) Philadelphia Ball Club, v. Lajoie, 627.

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INSOLVENCY.

1. INSOLVENCY.—Discharge in Insolvency is void as against nonresident creditors, because the insolvency court has no jurisdiction over them. (Me.) *Swift v. Winchester*, 414.

2. INSOLVENCY.—Effect of Discharge in on Nonresident.—If a nonresident does business in the state under a firm name which does not disclose his identity nor his residence, and which leads a debtor to believe that he is dealing with a resident, the discharge of the debtor in insolvency is not a bar to the claim of such nonresident creditor who does not participate in the insolvency proceedings. (Me.) *Swift v. Winchester*, 414.

3. INSOLVENCY.—Effect of Discharge in.—A discharge in insolvency is void as against nonresident creditors who have not made themselves voluntary and consenting parties to the proceedings, by proving their claims, accepting dividends, or otherwise. (Me.) *Swift v. Winchester*, 414.

4. INSOLVENCY.—The Effect of a Discharge in insolvency depends upon the authority of the court granting it, and not upon the conduct of the parties. (Me.) *Swift v. Winchester*, 414.

See Bankruptcy.

INSURANCE.

1. A CONTRACT OF INSURANCE is Personal as between the insurer and the insured, and does not attach to or run with the title to the insured property on a transfer thereof. (Ala.) *Shadgett v. Phillips & Crew Co.*, 95.

2. INSURANCE.—Iron-safe Clause.—A clause in a fire insurance policy requiring the insured to keep the books and inventories of his business securely locked in a fire-proof safe at night, and at all times when the building containing the insured goods is not actually open for business, or to keep such books and inventories in some place not exposed to a fire which would destroy the building, does not apply to an interruption of business during business hours without closing the building caused by impending danger from fire in the neighborhood. In such case, however, the insured must exercise reasonable diligence to save his books and inventories. (Ga.) *Phoenix Ins. Co. v. Schwartz*, 98.

3. INSURANCE, LIFE.—A Policy Delivered by an Agent Without Exacting Payment of the Premium under an agreement between him and the assured that the agent would accept as payment his own indebtedness for meat, and take meat for the balance, is void, where the policy contains a condition requiring all premiums to be paid at the home office, but provides that payments will be accepted if paid to the agent in exchange for a receipt signed by the president or secretary and countersigned by the agent, and that the policy shall not take effect unless the first premium is paid while the assured is in good health. (Wis.) *Tomsecek v. Travelers' Ins. Co.*, 846.

4. INSURANCE, LIFE—Payment of Premium.—It Will not be Presumed that a General Agent of a life insurance corporation has authority to issue a policy for anything but money. (Wis.) Tomsecek v. Travelers' Ins. Co., 846.

5. INSURANCE, LIFE—Waiver of Payment of Premium.—An agent of a life insurance company has no implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor equivalent to money to the corporation when taken. (Wis.) Tomsecek v. Travelers' Ins. Co., 846.

6. INSURANCE—Proceeds.—Where a Conditional Purchaser of Property or his vendee contracting to insure for the benefit of the conditional vendor, and in disregard thereof, insures in his own name, equity will establish a lien upon the proceeds of the policy in favor of the conditional vendor. (Ala.) Shadgett v. Phillips & Crew Co., 95.

7. INSURANCE, Proceeds of.—Strangers to an Insurance Contract cannot acquire in their own right any interest in the insurance money except through an assignment or some contract with which they are connected. (Ala.) Shadgett v. Phillips & Crew Co., 95.

8. INSURANCE.—The Recipient of a Gift is not Bound to Carry Out Her Donor's Contract to insure the property in favor of a conditional vendor, in the absence of any agreement on her part to do so, though the property in her hands is subject to the rights of the conditional vendor. (Ala.) Shadgett v. Phillips & Crew Co., 95.

INTEREST.

See Mortgages, 4.

Interstate Commerce, long and short haul, state regulations affecting, when void as interfering with, 254.

See Commerce.

INTOXICATING LIQUORS.

INTOXICATING LIQUORS—Statutory Crime.—The simple selling of intoxicating liquors is purely a statutory offense, and not a common-law crime. (W. Va.) State v. Gilliland, 793.

IRRIGATION.

See Waters and Watercourses.

Joint Tenancy, whether exists between part owners of vessels, 358.

JUDGES.

JUDGES, Disqualification of.—A judge who is related within the fourth degree of consanguinity or affinity to counsel for an applicant for alimony and counsel fees in a divorce proceeding is disqualified from presiding in the case and passing upon such application, although such counsel may have a contract with the applicant binding her to pay them for their services, independently of the success of the application for alimony and counsel fees. (Ga.) Roberts v. Roberts, 108.

JUDGMENTS.

1. **JUDGMENT AFTER DEATH.**—A decree rendered on the same day as, but after, the death of a material defendant in a cause is void and may be set aside on motion. (Ala.) *Ex parte Massie*, 20.

2. **JUDGMENT NUNC PRO TUNC**—**Estoppel to Move for.**—If an appellee moves to dismiss the appeal because the clerk failed to enter a formal judgment, he is not thereby estopped to move, at a subsequent term, for the entry of a judgment nunc pro tunc. (Ill.) *Metzger v. Morley*, 158.

3. **JUDGMENT NUNC PRO TUNC.**—The Minutes of the judge, though not properly a part of the record, are sufficient to authorize the entry of an order or judgment nunc pro tunc. (Ill.) *Metzger v. Morley*, 158.

4. **JUDGMENTS**—**Actions on.**—A statute which provides that "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States," shall be brought within a stated time, applies both to foreign and domestic judgments. (Wash.) *Citizens' Nat. Bank v. Lucas*, 748.

5. **ACTIONS ON JUDGMENTS.**—At Common Law a party has a right of an action upon his judgment as soon as it is recovered. (Wash.) *Citizens' Nat. Bank v. Lucas*, 748.

6. **ACTIONS UPON JUDGMENTS**—**Concurrent Remedy.**—If the law gives to a judgment creditor a right of action upon his judgment, such right is not taken away by any concurrent remedy that may be given him. (Wash.) *Citizens' Nat. Bank v. Lucas*, 748.

7. **ACTIONS ON JUDGMENTS.**—The Statute of Limitations commences to run on a domestic judgment as soon as it is rendered, and not after the expiration of the time during which execution may issue. (Wash.) *Citizens' Nat. Bank v. Lucas*, 748.

8. **JUDGMENTS**—**Estoppel.**—The estoppel of a judgment is always mutual, and if it binds one of the parties so as to prevent him from showing the truth, it also estops the other. (Ky.) *Bridges v. McAlister*, 267.

9. **JUDGMENTS**—**Res Judicata.**—A question not in issue, though passed upon in the opinion in a former appeal, is not res judicata on a subsequent trial or appeal, where the issue is properly made by the pleadings filed after the first appeal. (Ky.) *Bridges v. McAlister*, 267.

10. **RES JUDICATA.**—Issues Involved in the case, but not passed upon by the court in deciding it, are not res judicata. (S. C.) *Hunter v. Hunter*, 663.

11. **RES JUDICATA.**—The Verdict of a Jury is not admissible as evidence to create an estoppel before it has received the sanction of the court by passing into a judgment. Until then it is liable to be made nugatory by an order arresting judgment or granting a new trial. (Pa. St.) *Dougherty v. Lehigh Coal etc. Co.*, 660.

12. **WHERE A STATUTE IS SILENT** as to a Remedy, a court has inherent power to enforce its judgments or decrees according to its equity powers. (Wash.) *In re Cave*, 736.

See Appeal and Error, 7; Criminal Law, 3, 4; Principal and Agent.

JUDICIAL NOTICE.

See Evidence, 1.

JUDICIAL SALES.

JUDICIAL SALES—Title Deeds.—A purchaser at judicial sale gets no title or right to the deeds constituting the chain of title of the person whose property is sold. (Ga.) *Gay v. Warren*, 151.

See Executions.

JURISDICTION.

See Courts; Process.

LACHES.

LACHES is Not Imputable to the Government. (Ill.) *Estate of Ramsay v. People*, 177.

LANDLORD AND TENANT.

See Leases; Nuisance.

Leases, injunction against violating covenants of, 643-645.

LICENSE.

1. **LICENSE** to Use Partnership Name—When Irrevocable.—If the purchaser of partnership property at sheriff's sale is authorized by the persons forming such partnership to use the partnership name, at that time valueless, in the continuation of the business, and the purchaser, by the expenditure of large sums of money with the knowledge and consent of such persons, builds up the business, making it a success, and giving to such partnership name a value it did not possess at the time he began to use it, neither of such persons can thereafter enjoin him from the further use of the firm name. (Pa. St.) *Harris v. Brown*, 610.

2. **LICENSE**—When not Revocable.—If the Enjoyment of a license must necessarily be and is preceded by the expenditure of money, such license becomes an agreement on a valuable consideration, and is irrevocable. (Pa. St.) *Harris v. Brown*, 610.

3. **LICENSE**, Without Consideration, is Determinable at the pleasure of the licensor. (Pa. St.) *Harris v. Brown*, 610.

See Brokers; Fixtures; Railroads, 6, 7.

LIMITATION OF ACTIONS.

1. **LIMITATION OF ACTIONS**—Burden of Proof.—One who seeks to avail himself of the benefit of the statute of limitations must assume the burden of proving the facts necessary to sustain his plea. (S. C.) *Hunter v. Hunter*, 663.

2. **THE COMMON STATUTE OF LIMITATIONS**, and the analogous bars and presumptions in equity and at law, cease to operate against a claim from the time when it is submitted to the jurisdiction of the court. (N. J. Eq.) *Forman v. Brewer*, 475.

See Adverse Possession; Executors and Administrators, 1; Judgments, 7; Mortgages, 5-9; Nuisance, 3; States.

LIQUORS.

See Intoxicating Liquors.

LOGGING BOOM.

See Waters and Watercourses, 12-18.

MANDAMUS.

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Manslaughter, involuntary, defined, 571.

MARRIAGE.

See Divorce.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Contracts; Shipping, 3.

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See Equity.

Misdemeanors, against which party may be required to give security not to commit, 797, 798.

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security against further commission of, 798.

security against further keeping of a disorderly house, 798.

security against further keeping of a gambling-house, 798.

MONOPOLIES.

See Constitutional Law, 21; Injunctions.

MORTGAGES.

1. CONVEYANCES TO SECURE DEBTS are Mortgages. (N. J. Eq.) *Adoue v. Spencer*, 484.

2. A MORTGAGE is not an Alienation within the meaning of a statute prohibiting the alienation of land, since its purpose is not to pass absolute title. (Wash.) *Weber v. Laidler*, 726.

3. IF ONE CONVEYS OR MORTGAGES LAND to Which he Has then no Title, his after-acquired title will inure to the benefit of his grantee or mortgagee. (Wash.) *Weber v. Laidler*, 726.

4. INTEREST.—Mortgaged Lands in the Hands of Subsequent Purchasers are not bound for a greater rate of interest than that stipulated in the mortgage as recorded, unless the purchaser has agreed to pay a greater rate. (Wash.) *George v. Butler*, 756.

5. LIMITATION OF ACTIONS.—A Subsequent Grantee of a Mortgagor, not obligated to pay the debt, may plead the statute of limitations against an action to foreclose the mortgage, although the statute has not run as against the mortgagor and maker of the note secured thereby, by reason of his absence from the state. (Wash.) *George v. Butler*, 756.

6. LIMITATION OF ACTIONS.—Where a Mortgage is Given to Secure Several Notes which fall due at different dates, the statute

of limitations commences to run as to each note as it matures, and is not postponed until the maturing of the last note. (Wash.) *George v. Butler*, 756.

7. STATUTE OF LIMITATIONS.—A Mortgagor's Absence from the State does not Suspend the running of the statute of limitations as to a foreclosure of the mortgage, as against a subsequent grantee of the mortgaged premises. (Wash.) *Denny v. Palmer*, 766.

8. STATUTE OF LIMITATIONS.—A Subsequent Grantee of Mortgaged Premises who fails to record his deed is estopped to set up the statute of limitations against a foreclosure suit, brought within a reasonable time after notice of the grantee's rights is received, where the statute has not run as against the mortgagor by reason of his absence from the state. (Wash.) *Denny v. Palmer*, 766.

9. WHEN A DEBT SECURED by a Mortgage is Barred by the Statute of Limitations, the mortgage is also barred, and the mortgage cannot be revived by the act of the mortgagor as against a subsequent grantee without his consent. (Wash.) *George v. Butler*, 756.

See Public Lands.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATION—Corporate Powers—What Are. A statute providing for the organization and support of a police force of a city, the expenses thereof to be paid by a tax upon the property within the city, confers corporate powers. (Ohio St.) *State v. Jones*, 592.

2. NEGLIGENCE—Trespassing Child.—A municipal corporation is not liable for the death by drowning of a trespassing child who voluntarily wades beyond his depth into an uninclosed pond on a city lot not in proximity to any highway. (Ky.) *Schauf v. City of Paducah*, 220.

3. MUNICIPAL CORPORATIONS—Negligent Construction of Sewer—Pleading.—If a city charter imposes upon the corporate authorities the duty to establish, keep in repair, regulate and control drains, gutters, sewers and aqueducts, or cause this to be done, it is only necessary to aver in a complaint to recover of the corporation for injury by reason of the negligent construction of a sewer, or for allowing the sewer to become filled up, the existence of such duty by way of inducement, which is sufficiently certain when it is averred generally that it was the duty of the city to keep the sewer in repair or proper condition, or that it was legally bound to do so, or some such equivalent averment. (Ala.) *Arndt v. City of Cullman*, 922.

4. MUNICIPAL CORPORATIONS—Notice of Defective Sewer —Pleading.—To maintain an action against a city to recover for injury caused by a defective sewer, or by allowing such sewer to become filled up, the plaintiff must aver and prove express notice to the city of the alleged defect in the sewer, or facts from which it may be inferred that the corporate authorities were properly chargeable with constructive notice thereof. (Ala.) *Arndt v. City of Cullman*, 922.

5. MUNICIPAL CORPORATIONS—Defective Sewers.—Constructive Notice to a city of the defective condition of one of its sewers may be inferred from its notoriety, and from its continuance for such length of time as to lead to the presumption that proper officers of the town or city did in fact know, or with proper vigi-

lance and care might have known, the fact. (Ala.) *Arndt v. City of Cullman*, 922.

6. MUNICIPAL CORPORATIONS—Defective Sewers.—If a city, in the construction of a sewer, causes a large quantity of water which naturally flows in another direction to be diverted to and flow upon plaintiff's property in destructive quantities, it is liable in damages for just compensation, whether the work is done negligently or not, and a fortiori when the sewer is constructed in a negligent manner. (Ala.) *Arndt v. City of Cullman*, 922.

7. MUNICIPAL CORPORATIONS—Defective Sewers—Overflow—Evidence of Amount of Rainfall.—A city is bound to make provision for the carrying off through its sewers of such floods as may be reasonably expected, judging from such as have previously occurred, although at irregular and wide intervals of time; and it is not liable for damages which could not have been guarded against by the exercise of ordinary diligence, such as may be caused by unprecedented rains. Hence, if a city charged with damages arising from the overflow of a defective sewer offers evidence to show that the damage was caused by an unprecedented rainfall, evidence is admissible in rebuttal to show that such rainfall was not even extraordinary. (Ala.) *Arndt v. City of Cullman*, 922.

8. MUNICIPAL CORPORATIONS—Defective Sewers—Protection from Overflows.—A city is bound to protect a property owner therein against overflows caused by diverting waters from their natural channels by means of a defective sewer, and he is not bound to build a wall or other protection to prevent such overflow and protect his property. (Ala.) *Arndt v. City of Cullman*, 922.

9. MUNICIPAL CORPORATIONS—Defective Sewers.—The rights of a property owner in a city are not dependent on the error of judgment of the city in respect to constructing a sewer of sufficient size to carry off the water, even if the work done on it was performed in a skillful manner. (Ala.) *Arndt v. City of Cullman*, 922.

10. MUNICIPAL CORPORATIONS—Damages Arising from Change of Grade of Street.—A city is not absolved from liability for damages to a property owner from the fact that his lot is below the grade of the street as fixed by the city, if in changing such grade it prevents the natural flow of water and diverts it onto such lot. (Ala.) *Arndt v. City of Cullman*, 922.

11. MUNICIPAL CORPORATIONS—Right to Raise Sidewalks.—If a city is given power "to cause and procure all sidewalks now established, or hereafter to be established, to be graded, leveled, and curbed," and "such power as may be needed to compel the abutting property owners to pay the expenses and costs of the same," the city cannot compel the property owner himself to raise and level the sidewalk adjoining his property, but it can do the work itself and compel such owner to pay therefor. (Ala.) *Arndt v. City of Cullman*, 922.

12. MUNICIPAL CORPORATIONS—Implied Liability.—Municipal corporations are liable to actions of implied assumpsit with respect to money or property received by them and applied beneficially to their authorized objects through contracts which are simply unauthorized, as distinguished from contracts which are prohibited by their charters, or some other law bearing upon them, or are malum in se, or violative of public policy. As to the latter they are not liable in any manner. (Ala.) *Bluthenthal v. Town of Headland*, 904.

13. MUNICIPAL CORPORATIONS—Implied Liability Under Ultra Vires Transaction.—While a municipal corporation is not liable on an express contract which is ultra vires, it is liable in an action of implied assumpsit to the extent to which a loan advanced to it under an ultra vires transaction has been expended and devoted to the necessities of the corporation. (Ala.) *Bluthenthal v. Town of Headland*, 904.

14. MUNICIPAL CORPORATIONS—Liability on Prohibited Contracts.—A municipal corporation can make no contract which is prohibited by its charter or by statute, and if it enters into such contract, and money or other property is furnished under it, the city is not bound even on an implied assumpsit, although the money or property may have been used by it. (Ala.) *Bluthenthal v. Town of Headland*, 904.

15. MUNICIPAL INDEBTEDNESS.—The Rule that a County may incur indebtedness for those expenses necessary to maintain its existence, after it has reached the limit of its indebtedness, is applicable to municipalities. (Wash.) *Hull v. Ames*, 743.

16. MUNICIPAL INDEBTEDNESS.—Warrants Issued by a Municipality beyond the limit of the indebtedness authorized by its charter and the state constitution are valid in so far they they were issued for necessary expenses in maintaining the existence of the municipality. (Wash.) *Hull v. Ames*, 743.

Municipal Corporations, animals, impounding of, authority of to authorize, 216, 217.

See *Animals*; *Constitutional Law*, 12, 13; *Counties*; *Evidence*.

MURDER.

See *Homicide*.

NAVIGABLE WATERS.

1. NAVIGABLE WATERS.—A Public Highway for Floatage in a stream exists when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use. (Ky.) *Murray v. Preston*, 232.

2. NAVIGABLE WATERS—What are.—It is not essential that the capacity of a stream for floatage should be continuous to constitute it a public highway. It is sufficient if it is ordinarily subject to periodical fluctuations, attributable to natural causes, and recurring regularly like the seasons, and that its periods of high water and navigable capacity for floatage continue a sufficient length of time to make it useful as a highway. (Ky.) *Murray v. Preston*, 232.

3. WATERS AND WATERCOURSES—Non-navigability—Power of Legislature.—If a stream is not navigable in fact, it cannot be declared navigable by statute so as to deprive the riparian owner, without compensation, of his right to place obstructions in or across it. (Ky.) *Murray v. Preston*, 232.

See *Waters and Watercourses*.

NEGLIGENCE.

1. ACTIONABLE NEGLIGENCE Exists Only When one negligently injures another to whom he owes the duty of exercising care. (Ohio St.) *Baltimore etc. Ry. Co. v. Cox*, 583.

2. NEGLIGENCE—Burden of Proof—Death of Witness.—To recover for the death of a person caused by negligence, the plaintiff has the burden of proof to show that deceased was free from contributory negligence, and the fact that the witness by whom this could have been proved is dead does not change the rule so as to entitle the plaintiff to recover without such proof. (Me.) *Day v. Boston etc. R. R.*, 335.

3. NEGLIGENCE—Contributory—Burden of Proof.—A person seeking to recover for the negligence of another must affirmatively prove his own freedom from contributory negligence. (Me.) *Day v. Boston etc. R. R.*, 335.

4. NEGLIGENCE—Contributory—Proximate Cause.—If a person becomes aware of the thoughtless negligence of another which may result in harm to him, and it is in his power to prevent such harm, it is his duty to do so, otherwise his negligence becomes the proximate cause of the injury, and he cannot recover therefor. (W. Va.) *Creel v. Charleston Natural Gas Co.*, 772.

5. NEGLIGENCE—Contributory—Proximate Cause.—One person has no right to take advantage of the oversight and knowingly be guilty of such an act of omission or commission as will cause damage to property in his charge, and then shift the burden therefor onto another, who, though careless, is guilty of no willful or damaging wrong. (W. Va.) *Creel v. Charleston Natural Gas Co.*, 772.

6. NEGLIGENCE in Another State, when a Question for the Jury.—In an action to recover for a negligent act alleged to have been committed in another state, it is error for the court to instruct the jury what facts do or do not constitute negligence, in the absence of proof of a statute or valid municipal ordinance of such other state declaring such act to be negligence. The error is not cured by the fact that the charge is a literal extract from a decision by the court of last resort in the state where the act in question was committed. (Ga.) *Savannah etc. Ry. Co. v. Evans*, 116.

7. NEGLIGENCE—Question for Jury.—The question as to what acts do or do not constitute negligence is exclusively for the jury, except when the particular act complained of is declared to be negligence by a statute or a valid municipal ordinance. (Ga.) *Savannah etc. Ry. Co. v. Evans*, 116.

Negligence, homicide due to, when constitutes manslaughter, 571, 572,
See Carriers; Death; Fences; Gas; Homicide; Municipal Corporations; Railroads.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NONRESIDENTS.

See Process.

NUISANCE.

1. NUISANCE.—Lessors Who Create a nuisance are liable equally with their lessee with notice for its maintenance and continuance. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

2. NUISANCE, MOVABLE—Damages.—Permanent damages cannot be recovered for the maintenance of a removable nuisance, but actual damages may be recovered for its maintenance up to the time of judgment, and exemplary damages for its maintenance thereafter. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

3. NUISANCE.—Statute of Limitations does not run against a continuing nuisance, except as against its maintenance five years prior to the institution of the suit. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

OFFICERS.

1. PUBLIC OFFICERS, Revising Allowances to.—Where it appears that the county board, in making allowances to a sheriff, acted on a wrong basis, the court must correct such action by making the allowance on the basis prescribed by law. (Wis.) *Northern Trust Co. v. Snyder*, 867.

2. PUBLIC OFFICERS, Claim of, Founded on Mistake of Law.—The fact that a custom had existed to allow a sheriff for moneys expended and services rendered outside of the state in the pursuit and arrest of criminals, and that he believed that such allowance might lawfully be made, cannot confer on the courts any power to save him harmless from his mistake, or to excuse him from accounting for moneys paid him for such expenses and services without authority of law. (Wis.) *Northern Trust Co. v. Snyder*, 867.

3. PUBLIC OFFICER, Compensating for Service Rendered Outside the State.—Manifestly a sheriff cannot perform any official duty outside of the state, and hence cannot recover for services rendered or expenses incurred beyond the state in the pursuit or arrest of criminals, in the absence of some statute expressly authorizing such recovery. (Wis.) *Northern Trust Co. v. Snyder*, 867.

4. PUBLIC OFFICER'S COMPENSATION, Fixing of, After Services are Rendered.—Though a statute clearly contemplates that the compensation of an officer for his services shall be fixed in advance of their rendition, still, if not so fixed, the officer has a legitimate claim which may be subsequently adjusted and paid. (Wis.) *Northern Trust Co. v. Snyder*, 867.

5. PUBLIC OFFICERS, Compensation not Authorized by Law.—If a statute provides that a sheriff shall not be allowed for the services of an assistant unless the magistrate making the commitment certifies to the necessity for his assistance, the court cannot authorize such allowance on the ground that assistance was, in fact, necessary. (Wis.) *Northern Trust Co. v. Snyder*, 867.

6. PUBLIC OFFICER, Fees of, When Controlled by Fees for Similar Services—Where a fee is prescribed for a particular service, and the duty is imposed to perform another service of a similar character for which compensation is allowed, but for which no rate is expressly fixed, the fee specified for such particular service should be regarded as the legislative measure to be followed in similar matters, in the absence of some special circumstance indicating that it was not intended to be such guide. (Wis.) *Northern Trust Co. v. Snyder*, 867.

7. OFFICE—Waiver of Right to Salary—Illegal Removal.—An officer who has abandoned and relinquished his office and its emoluments, by acquiescing in his removal, and failing for years to make any pretense of being the incumbent of the office, or entitled to its salary, thereby waives his right to such salary, although his removal from the office was illegal and void. (Me.) *Cote v. City of Biddeford*, 417.

8. OFFICE—Abandonment of and Waiver of Right to Salary.—An officer who has abandoned and relinquished his office and its emoluments by acquiescing in his removal therefrom for years, though not admitting the legality of such removal, and by failing

during all that time to make any formal demand for the office or its compensation, or to object to the performance of official duties, or drawing salary by his successor, or to institute proceedings to test the title to the office or the right to remove him, while he engages in other occupations, is not entitled to recover the salary of the office. (Me.) *Cote v. City of Biddeford*, 417.

9. **OFFICE**.—Appointment to a Government Office is, in itself, the exercise of a governmental function, and can be exercised only by a governmental officer, and not by the legislature. (Mo.) *State v. Washburn*, 430.

10. **OFFICE**.—Contract for Sale of.—An agreement between a sheriff and his deputy, whereby the latter undertakes to perform all the services of the sheriff in a certain district, except the collection of a certain tax, in consideration that he shall have and retain all the fees and commissions arising from the work, and under which he is to pay the sheriff a stated sum at all events, is void as a sale, or farming, of part of an office. Had the agreement provided that the deputy should retain all fees and commissions collected, less the sum to be paid to the sheriff, it would have been valid. (W. Va.) *White v. Cook*, 775.

11. **OFFICE**.—Contract for Sale of.—Liability on Bond.—If an agreement and an official bond referring to and made a part thereof, between a sheriff and his deputy, stipulates that the latter is to perform all of the services of the sheriff in a certain district, in consideration that he shall pay to the sheriff a certain sum at all events, and be allowed to retain all fees and commissions collected and arising from the work, no recovery can be had upon the bond or otherwise for the money which the deputy agrees to pay his principal, as the contract is illegal as the sale of part of an office, but recovery may be had on the bond for the fees and commissions collected by the deputy, and as to them the contract must be regarded as relating to public funds, and in so far as it may affect them, is severable from the remainder of the contract, and to the end that public interest may be protected, the contract and bond are valid as to such fund. (W. Va.) *White v. Cook*, 775.

12. **OFFICE**.—Contract for Sale of.—While public policy forbids the sale of an office in whole or in part, it requires the protection and faithful application of the public revenue, and no contract between officers for the sale of an office can be so construed as to permit or affect the loss of public funds, or the funds of innocent persons in the hands of such officers, whether they be officers *de jure* or *de facto*. (W. Va.) *White v. Cook*, 775.

13. **OFFICE**.—Right to, Under Unconstitutional Statute.—Persons claiming to be the successors of the defendants in office are without authority to make the relation in mandamus to compel its delivery to them, unless the act under which they were appointed is valid. (Ohio St.) *State v. Jones*, 592.

14. **OFFICERS**.—Accounting by Deputy.—A bill in equity by a sheriff against his deputy for an accounting cannot be maintained without a showing that the accounts are complicated or intricate, or of special circumstances entitling him to discovery as necessary to adequate relief. (W. Va.) *White v. Cook*, 775.

15. **OFFICIAL BOND**.—Common-law Undertaking.—An Officer and His Sureties are Estopped to deny the validity of a bond under which he is allowed to receive public moneys. It will be obligatory as a common-law undertaking, unless prohibited by statute or public policy. (Ill.) *Estate of Ramsay v. People*, 177.

16. OFFICIAL BONDS.—The Sureties on an officer's bond are liable for all duties imposed upon him within the scope of his office, whether required by laws enacted before or after the execution of the bond. (Ill.) Estate of Ramsay v. People, 177.

17. OFFICIAL BONDS.—Where a Temporary Bond was given by the warden of a penitentiary, his new bond is binding on the sureties, irrespective of what became of the temporary one. (Ill.) Estate of Ramsay v. People, 177.

18. OFFICIAL BONDS.—The Statute in Force when an official bond is executed constitutes a contract between the officer, his sureties, and the public. (Ill.) Estate of Ramsay v. People, 177.

19. OFFICIAL BONDS.—Proof of Execution.—The acknowledgment of an official bond is prima facie evidence of its due execution, and, if no countervailing evidence is offered, proof of the signatures is unnecessary. (Ill.) Estate of Ramsay v. People, 177.

20. OFFICIAL BONDS.—The Duty of Approving an official bond by some representative of the government is due to the public, and not to the principal in the bond or his sureties. (Ill.) Estate of Ramsay v. People, 177.

21. OFFICIAL BOND.—Effect of Nonapproval.—The sureties on the bond of the warden of a penitentiary cannot escape liability because of the nonapproval of the bond by the governor. (Ill.) Estate of Ramsay v. People, 177.

22. OFFICIAL BONDS.—Approval—Nonaction.—An official bond, delivered to the representative of the government, becomes a binding obligation, unless disapproved by him. His mere nonaction does not deprive the office of power to act or release the sureties. (Ill.) Estate of Ramsay v. People, 177.

23. OFFICIAL BONDS.—No Formal Acceptance of an official bond is necessary, nor need there be written evidence of its acceptance and approval. (Ill.) Estate of Ramsay v. People, 177.

24. OFFICIAL BONDS.—Presumption of Delivery.—When the bond of the warden of a penitentiary is approved by the commissioners thereof and deposited with the Secretary of State, the presumption is that it has been delivered. (Ill.) Estate of Ramsay v. People, 177.

25. OFFICIAL BONDS.—Copies of Official Bonds deposited with the Secretary of State, when certified and authenticated by his seal, are admissible in evidence in the same manner and with like effect as the originals. (Ill.) Estate of Ramsay v. People, 177.

26. OFFICIAL BOND.—Deposit in Insolvent Bank.—The warden of a penitentiary and his sureties are not absolved from liability when he deposits public funds in an insolvent bank which he supposes solvent, though his bond is conditioned only for the faithful performance of his duties as warden. (Ill.) Estate of Ramsay v. People, 177.

27. OFFICIAL BONDS.—Negligence of Other Officers.—The sureties of a public officer cannot be heard to say, in defense of their liabilities for money deposited by him in an insolvent bank, that other officers were negligent in allowing him to have control of it. (Ill.) Estate of Ramsay v. People, 177.

28. OFFICIAL BONDS.—An Officer Becomes an Insurer of public funds coming into his hands when he executes a bond binding him to perform the duties of his office. (Ill.) Estate of Ramsay v. People, 177.

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PARTNERSHIP.

1. PARTNERSHIP—Holding Out as Partner.—In the absence of an agreement to become a partner, a person cannot be held liable as such, unless he holds or permits himself to be held out as a partner. (Ala.) Owensboro Wagon Co. v. Bliss, 907.

2. PARTNERSHIP—Proof of Existence.—Declarations of one partner, not made in the presence of his copartner, are not competent to prove the existence of a partnership between them. It is only when the partnership has been otherwise proved that the declarations of one partner are evidence against the other as to the conduct of the partnership business. (Ala.) Owensboro Wagon Co. v. Bliss, 907.

3. PARTNERSHIP—Proof of Existence of.—The existence of a partnership can never be established by general reputation, or on hearsay evidence. (Ala.) Owensboro Wagon Co. v. Bliss, 907.

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1. PERJURY—Indictment.—In a prosecution for perjury, it is essential to correctly describe, and accurately prove, the judicial proceeding in which the perjury is alleged to have been committed. It must be accurately described in the indictment and must be proved substantially as laid. (Ga.) *Wilson v. State*, 104.

2. PERJURY—Indictment—Variance.—An indictment for perjury, charging it to have been committed in a preliminary examination of one warrant against two persons, is not sustained by proof showing a preliminary examination of two warrants, one against each of two persons. The variance is fatal, although such persons are identical with those referred to in the joint case. (Ga.) *Wilson v. State*, 104.

3. PERJURY May be Assigned Upon false testimony going to the credit of a witness. (Ga.) *Wilson v. State*, 104.

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PLEADING AND PRACTICE.

1. PLEADING—Waiver of Objections to Petition.—The objections to a petition that the court has no jurisdiction over the subject matter, and that the petition does not state facts sufficient to constitute a cause of action, cannot be waived. (Mo.) *Marks etc. Clothing Co. v. Watson*, 440.

2. PRACTICE. Where a Question is Properly Reserved on Objections to Evidence and requested instructions, no necessity exists for considering a ruling on a demurrer which raises the same question. (Ala.) *Western Union Tel. Co. v. Ayers*, 92.

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PLEDGE OF STOCK.—If the Secretary of a Corporation finds and abstracts from the custody of the company, a mislaid and supposedly canceled or surrendered certificate of stock, which was issued to him, but afterward transferred to the company as collateral, and pledges it for a personal indebtedness, the innocent pledgee takes no title. (Ohio St.) *Farmers' Bank v. Diebold Safe etc. Co.*, 586.

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POWERS.

1. **POWER**—Sale of Trees.—A Power Reserved in a Trust Deed to sell any portion of the property is properly executed by selling trees and timber without a sale of the land itself. (Ala.) Gulf Red Cedar Lumber Co. v. O'Neal, 22.

2. **POWERS**.—A Deed Made by the Donee of a Power, although it purports to dispose of only the individual property of the donee, constitutes a good execution of the power, if such is the intent, and it cannot operate in any other way. (Ala.) Gulf Red Cedar Lumber Co. v. O'Neal, 22.

3. **POWERS**—Execution of, What is.—Where a grantor in a trust deed reserves the power to control, sell and convey any portion of the property, and who also has an undivided interest therein, a deed of a portion of such property, which makes no reference to the trust deed, but which is obviously intended to pass the entire interest in the property, is a good execution of the power, and does not merely dispose of the undivided interest of the grantor. (Ala.) Gulf Red Cedar Lumber Co. v. O'Neal, 22.

4. **POWERS**.—It is not Necessary That an Intention to Execute a Power of Sale should expressly appear upon the face of the instrument. (Ala.) Gulf Red Cedar Lumber Co. v. O'Neal, 22.

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PRINCIPAL AND AGENT.

JUDGMENTS—Principal and Agent.—A judgment against an agent requiring a ditch to be filled binds his principal, so that, upon a reversal of such judgment, he cannot recover damages for injury to his property resulting from the filling of the ditch, in obedience to the judgment, prior to its reversal. (Ky.) Bridges v. McAlister, 267.

PRINCIPAL AND SURETY.

1. **SURETYSHIP**.—The Liability of Sureties upon Probate Bonds is contingent only upon the failure of their principal to pay the amount with which he stands charged. The surety is not a party so directly interested that he can be considered as "aggrieved" by a decree of the court respecting the settlement of his principal's account. (Me.) Shaw v. Humphrey, 349.

2. **SURETIES**—Right of Appeal.—A surety upon a probate bond has no right of appeal from a decree of the probate court allowing or disallowing the account filed by his principal, or by the principal's legal representative. (Me.) Shaw v. Humphrey, 349.

See Officers and Official Bonds.

PROBATE LAW.

See Descent and Distribution; Executors and Administrators.

PROCESS.

1. JURISDICTION—Service of Process—Nonresidents.—Constructive service of process is inefficient to confer jurisdiction, if made upon persons temporarily residing within the state. (Me.) *Thomas v. Thomas*, 342.

2. JURISDICTION—Service of Process on Nonresident.—If the defendant is a nonresident and only commorant within the state, and so described in the writ, a return of an officer showing only a constructive service is not sufficient to confer jurisdiction of his person. (Me.) *Thomas v. Thomas*, 342.

3. JURISDICTION.—Substituted or Constructive Service of process upon a defendant is a departure from the common law, and the authority for it must be strictly followed. (Me.) *Thomas v. Thomas*, 342.

See Attachment.

PROPERTY.

DEFINITION.—Mixed Property is that kind of property which is not altogether real, nor personal, but a compound of both. (N. J. Eq.) *Miller v. Worrall*, 480.

PUBLIC LANDS.

1. LANDS Entered Under the United States Homestead Act cannot be made liable for a debt contracted before the issuance of a patent therefor, by any unwilling or involuntary appropriation thereof, as by execution or attachment. (Wash.) *Weber v. Laidler*, 726.

2. FEDERAL HOMESTEAD.—A Mortgage upon Government Land Prior to Entry thereon under the United States homestead law is valid and enforceable on the ground of estoppel. (Wash.) *Weber v. Laidler*, 726.

3. FEDERAL HOMESTEAD.—A Valid and Enforceable Mortgage may be made upon government land, entered under the United States homestead act, prior to the issuance of a patent therefor, if title is subsequently acquired. (Wash.) *Weber v. Laidler*, 726.

PUBLIC OFFICERS.

See Officers.

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QUANTUM MERUIT.

See Contracts, 3.

RAILROADS.

1. RAILROADS—Negligent Escape of Sparks—Burden of Proof. To recover damages for fire, alleged to have been caused by the negligent escape of sparks from a railway locomotive, the burden is on the plaintiff in the first instance to show that the fire was caused by such sparks, and this being proven, a presumption of negligence arises against the railway company, casting the burden

upon it to show that such locomotive was properly constructed, equipped with approved devices and appliance to prevent the escape of sparks, in good repair, and prudently managed and controlled. Upon proof of these facts, the presumption arising from the mere communication of fire from the locomotive is rebutted, and the plaintiff cannot recover without proof of other specific acts of negligence or want of care on the part of the railroad company. (Ala.) Louisville etc. R. R. Co. v. Marbury Lumber Co., 917.

2. **RAILROADS—Negligent Escape of Sparks—Evidence.**—If it is sought to recover damages for fire alleged to have been caused by the negligent escape of sparks from a locomotive, and the evidence as to the origin of the fire is circumstantial, the fact that the weather had been dry for several days prior to the fire is admissible in connection with other circumstances tending to show that the fire was caused by sparks emitted from such locomotive. (Ala.) Louisville etc. R. R. Co. v. Marbury Lumber Co., 917.

3. **RAILROADS—Negligent Escape of Sparks—Evidence of Nature of Train.**—In an action to recover damages for fire alleged to have been caused by the negligent escape of sparks from a railway locomotive, evidence as to whether the train drawn by such locomotive was light or heavy is admissible as tending to show the number and size of the sparks emitted, and this is a circumstance to be considered in determining whether the train was properly equipped and handled. (Ala.) Louisville etc. R. R. Co. v. Marbury Lumber Co., 917.

4. **RAILROADS—Fires—Evidence of Speed of Train.**—If it is sought to recover damages for a fire alleged to have been caused by sparks from a railway locomotive, evidence of the excessive use of steam in attempting to make up lost time is a fact competent to be considered, in determining whether the company exercised due diligence in the operation of the train, and on the question whether the fire occurred by reason of sparks from the locomotive. (Ala.) Louisville etc. R. R. Co. v. Marbury Lumber Co., 917.

5. **RAILROADS—Fires—Size of Sparks Emitted—Evidence.**—If, in an action to recover damages for a fire alleged to have been caused by sparks from a railroad locomotive, it is in evidence that the sparks emitted were as large as the end of witness' little finger, it is competent for another witness, testifying as an expert, to state the size of sparks emitted by an engine in good condition and properly equipped. (Ala.) Louisville etc. R. R. Co. v. Marbury Lumber Co., 917.

6. **RAILROADS—Licensee on Track.**—A Railroad Employé, whose duties do not require him to go upon the track in a hand-car, but who does so as a matter of convenience, and without objection from the company, is, at most, a mere licensee, to whom the company owes no duty of especial protection in running trains, except to use reasonable care after discovering him. (Ohio St.) Cleveland etc. Ry. Co. v. Workman, 602.

7. **RAILROADS—Contributory Negligence.**—If a Railway Employé, for no other reason than his own convenience, goes upon the main track with a hand-car, against the orders of a superior, and without looking behind him, when he could reach his destination on a sidetrack, no recovery can be had for his death from a passing train, unless the defendant could have avoided the accident after discovering him. (Ohio St.) Cleveland etc. Ry. Co. v. Workman, 602.

8. **NEGLIGENCE at Railroad Crossing—Absence of Danger Signal.**—A traveler upon the highway approaching a railroad cross-

ing has no right to depend solely upon any signal from a passing train, and must, in the absence of such signal, still be on his guard and endeavor to ascertain by looking and listening, the actual fact whether or not a train is approaching. (Me.) Day v. Boston etc. R. R., 335.

9. **NEGLIGENCE at Railroad Crossing—Duty of Traveler.**—A traveler upon the highway must look both ways and listen for trains at the very time he is approaching a railroad crossing, and an omission to do this, if unexplained, is contributory negligence per se, which bars an action for the collision, even though the railroad company was negligent. (Me.) Day v. Boston etc. R. R., 335.

10. **NEGLIGENCE at Railroad Crossing.**—Looking straight ahead at or toward a railroad crossing is not sufficient precaution for any traveler who proposes to cross over to relieve him of contributory negligence. He must look both ways along the track to see what is approaching the crossing as well as what is on it. (Me.) Day v. Boston etc. R. R., 335.

11. **NEGLIGENCE at Railroad Crossing—Speed of Train.**—The fact that a railroad train is approaching a crossing at much greater speed than is allowed by law does not diminish the duty of a traveler on the highway to use due care in approaching the crossing to avoid a collision. (Me.) Day v. Boston etc. R. R., 335.

12. **NEGLIGENCE, CONTRIBUTORY—Evidence.**—In an action to recover for negligence at a railroad crossing, evidence that a hand-car passed over the crossing when a traveler on the highway, afterward injured at the crossing, was driving along parallel with the railroad and that the men on the hand-car saw such traveler, is not evidence that the latter noticed the hand-car, or that if he did notice it, that it influenced his subsequent conduct, or caused him to stop, look and listen for the approaching train so as to relieve him of contributory negligence in failing so to do. (Me.) Day v. Boston etc. R. R., 335.

13. **RAILROADS—Signals of Train.**—The Statutory Duty of a railroad to give signals when a train approaches a crossing does not inure to the benefit of persons who are on the track, and not at a crossing. (Ohio St.) Cleveland etc. Ry. Co. v. Workman, 602.

14. **RAILROADS—Duty to Person on Freight Train.**—There can be no recovery for the negligent death of a person riding on a freight train with the assent of the conductor, but against the rules of the railroad company. (Ohio St.) Baltimore etc. Ry. Co. v. Cox, 583.

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RELIGIOUS SOCIETIES.

1. **A COURT OF EQUITY Will Protect Religious Organizations** in what they hold, in order to sustain trusts, because of their charitable uses which would otherwise be held void. (Ala.) *Hundley v. Collins*, 33.

2. **AN INCORPORATED CHURCH Consists of Two Entities**, the church as such, not owing its spiritual existence to the civil law, and the legal corporation. (Ala.) *Hundley v. Collins*, 33.

3. **AN INDEPENDENT CHURCH, not Subject to the Control of Any Higher or Ecclesiastical Judicature**, is a law unto itself, self-governing and amenable to no court, ecclesiastical or civil, in the discharge of its religious functions. (Ala.) *Hundley v. Collins*, 33.

4. **CHURCH MEMBERSHIP—Mandamus.**—Where no Property Interest or civil rights are involved, mandamus will not lie to restore to membership one claiming to have been wrongfully removed from a church. (Ala.) *Hundley v. Collins*, 33.

5. **CORPORATIONS.—A Church or Religious Society** may exist for all purposes for which it was organized, independently of any incorporation of the body under the statutes of the state. (Ala.) *Hundley v. Collins*, 33.

6. **DEFINITION.—A Church is a Voluntary Association of Members**, united together by covenant or agreement, for the purpose of maintaining the public worship of God, observing the ordinances of His house, the promotion of the spirituality of its membership, and the spread of divine truth among others. (Ala.) *Hundley v. Collins*, 33.

RES JUDICATA.

See Criminal Law, 3, 4; Judgments, 9-11.

RIPARIAN RIGHTS.

See Waters and Watercourses.

SATISFACTION.

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SEARCHES AND SEIZURES.

SEARCH-WARRANT.—Act of Magistrate in issuing a search-warrant is ministerial and not judicial. (Me.) *State v. Conwell*, 333.

See Sunday.

SETOFF AND COUNTERCLAIM.

1. **SETOFF as Matter of Right** did not Exist at common law, but is a mere creature of statute, which cannot be construed to meet cases not specially included in its terms. (Ala.) *Drennen v. Gilmore*, 902.

2. **SETOFF—Mutuality.**—To sustain a setoff the debts must be mutual, and the demands must be subsisting causes of action, such as give to the parties a simultaneous cause of action, the one against the other, at the time suit is brought. (Ala.) *Drennen v. Gilmore*, 902.

3. SETOFF—Partnership.—A partner sued individually for a debt due from the partnership cannot set off a debt owed by plaintiff to the partnership without pleading and proving the ownership of such debt in absolute right at the time of the commencement of the suit. (Ala.) *Drennen v. Gilmore*, 902.

4. SETOFF, to be available, must be owned by the defendant in absolute right, at the time suit is brought. (Ala.) *Drennen v. Gilmore*, 902.

SEWERS.

See Municipal Corporations.

SHERIFFS AND CONSTABLES.

1. SHERIFF—Compensation for Unsuccessful Pursuit of Criminals.—A statute allowing an officer "compensation for travel to serve a criminal warrant" does not entitle him to any compensation when his services are not successful, or, in other words, where he does not succeed in serving his warrant by making an arrest. (Wis.) *Northern Trust Co. v. Snyder*, 867.

2. SHERIFF, Effect of Erroneously Acting on the Advice of the District Attorney.—The district attorney has no right to direct a sheriff to go beyond the jurisdiction of the state or to do anything not required by law, and the fact that a sheriff acted under the mistaken advice of the district attorney cannot entitle him to compensation from the county. (Wis.) *Northern Trust Co. v. Snyder*, 867.

SHIPPING.

1. SHIPPING—Rights of Part Owners—Contract to Surrender Control.—The right of a majority in interest of the owners of a vessel to control its management is charged with the duty to retain and exercise not only for the benefit of all the owners, but others whose property and lives may be involved, and an agreement to surrender such control permanently or indefinitely is inconsistent with the trust which the law implies and imposes, and is void as against public policy. (Me.) *Smith-Green Co. v. Bird*, 352.

2. SHIPPING—Rights of Part Owners.—Contracts for the Sale of Sailing Rights by a part owner of a vessel are not susceptible of specific enforcement, either by way of estoppel or by direct proceeding. (Me.) *Smith-Green Co. v. Bird*, 352.

3. NEGLIGENCE—Master and Servant.—The owner of a steamboat is alone, and not jointly with the master thereof, liable for the negligence of the latter while acting in his representative character. (La.) *Le Blanc v. Sweet*, 303.

See Vessels, Part Owners of.

STATES.

1. EVIDENCE—Rules of as Applied to State.—If the state comes into its courts, it is subject, like all other suitors, to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. (Pa. St.) *In re Ash's Estate*, 658.

2. EVIDENCE.—Statutes of Limitation do not Apply to the State, but rules of evidence and legal presumptions are not changed for or against the state as a suitor. (Pa. St.) In re Ash's Estate, 658.

3. PAYMENT, Presumption of as Against the State.—Presumption of Payment from lapse of time is simply a rule of evidence affecting the burden of proof, and applies to the state the same as to ordinary suitor. (Pa. St.) In re Ash's Estate, 658.

Statute of Frauds, antenuptial settlements and agreements are within, 510.

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STATUTES.

1. A CONSTITUTIONAL PROVISION that no Act shall be Amended by Mere Reference to its title, but the act amended shall be set forth at full length, does not apply to supplemental acts not modifying the original act, nor to those merely adding new sections, nor to acts complete in themselves, not purporting to be amendatory. (Wash.) Copland v. Pirie, 769.

2. STATUTES.—A Title of Act which serves to indicate its object cannot be said to have misled the legislature at the time when it was adopted. (La.) State v. Bolden, 280.

3. CONSTITUTIONAL LAW.—An Exemption Act not complete in itself, which ingrafts into a section of an existing statute an additional exemption which alters its scope and effect, is clearly amendatory, and to comply with the constitutional requirement, must set forth the section amended at full length. (Wash.) Copland v. Pirie, 769.

4. STATUTES—Interpretation.—The Title of an Act may be taken in connection with its other parts to assist in removing ambiguities, if the intent is not plain. (La.) State v. Bolden, 280.

5. STATUTORY CONSTRUCTION.—Exceptions strengthen the force of a general law, and enumeration weakens, as to things not enumerated. (Mo.) Marks etc. Clothing Co. v. Watson, 440.

6. THE WORD "AND" is Often Used Interchangeably with "or," the meaning being determined by the context. (Wash.) Geiger v. Kobilka, 733.

7. STATUTES Adopted from Another State, Construction of.—If a statute, after its construction by the courts of the state wherein it originated, is adopted as a statute of another state, such construction must be followed in the courts of the latter. (Wis.) Black v. State, 853.

8. STATUTES—Repealed Cannot be Amended.—An amendatory statute, to be valid, must relate to an existing statute, and not to one which has been repealed and is wholly inoperative. (Ga.) Lampkin v. Pike, 153.

9. STATUTES—Courts.—A statute establishing a city court and providing that the judgments of such court may be reviewed by the supreme court upon a direct bill of exceptions, is without effect, if at

the time of the passage of such statute there is no such incorporated city as that named therein. (Ga.) *Lampkin v. Pike*, 153.

See Constitutional Law.

Suicide, unintentional killing of a third person in an attempt to commit, 581.

SUMMONS.

See Process.

SUNDAY.

SEARCH-WARRANTS—Issue on Sunday.—The fact that a search and seizure warrant is issued on Sunday does not render it invalid. (Me.) *State v. Conwell*, 333.

TAILOR.

See Exemptions.

TAXATION.

1. **A TAX** is a Tribute commanded by sovereignty of the subject and for which his property is held. (Ill.) *Village of Lemont v. Jenks*, 172.

2. **TAX** as a Personal Charge.—A Special Tax or Assessment is not a personal charge and cannot be recovered in a personal action. (Ill.) *Village of Lemont v. Jenks*, 172.

3. **TAXATION**—What is Not.—The words “tax, rent, or rates,” in a statute authorizing cities to assess and collect from the inhabitants thereof taxes, rents, or rates for water supplied to them, relate to money due the city by virtue of contractual relations, and not to any mode of taxation, strictly speaking. (Ill.) *Village of Lemont v. Jenks*, 172.

4. **TAXATION**.—Omitted Property may not be Assessed in the Following Year, when the statute of the state requires all property to be assessed on the first day of May in the year in which the assessment is made and in the assessment district in which the owner resides, and it appears to be assessable to an administrator who is not a resident in the assessment district in which such property was in the year when it was omitted from the assessment. (Wis.) *City of Fond Du Lac v. Otto*, 830.

5. **TAXATION**—Uniformity.—A Water Ordinance imposing, as compensation for fire protection, a certain sum per annum, in addition to the water rates, on each lot having thereon a building and adjoining a street through which is a public water pipe, without regard to the value of the property, is unconstitutional. (Ill.) *Village of Lemont v. Jenks*, 172.

6. **ASSESSMENT FOR TAXATION**, to Whom Must be Made.—A Special Administrator is an administrator, within the meaning of a statute requiring personal property in the possession of an administrator to be assessed to him. (Wis.) *City of Fond Du Lac v. Otto*, 830.

7. **FOURTEENTH AMENDMENT**, Taxation Which Violates.—A tax law which makes unjust discrimination—which taxes one person at one rate and another one within the same class, under like cir-

circumstances, at another rate, or exempts him altogether—denies the equal protection of the law. (Wis.) *Black v. State*, 853.

8. **INHERITANCE TAXES.**—A Succession Tax is a tax on the privilege of receiving property, and not a tax upon property. (Wis.) *Black v. State*, 853.

9. **INHERITANCE TAXES, Exemption, Reasonable Amount of.**—An exemption from inheritance taxes of all estates under ten thousand dollars in value cannot be held unreasonable as to amount. (Wis.) *Black v. State*, 853.

10. **INHERITANCE TAXES — Unreasonable Discrimination.**—When a statute imposing inheritance taxes undertakes to exempt therefrom all estates whose value is less than ten thousand dollars, the beneficiaries being of the same class, and the tax being levied without regard to the amount received by the individual beneficiary, the classification is arbitrary, and the statute therefore unconstitutional. (Wis.) *Black v. State*, 853.

See Constitutional Law, 4.

TELEGRAPHS AND TELEPHONES.

TELEGRAPH COMPANIES.—Damages for Mental Pain and Suffering are not recoverable by the sender of a telegraph message on account of the absence of the sendee resulting from the negligence of the carrier, where there does not exist between the sender, the sendee, and the person concerning whom the message is sent, that close degree of relationship from which natural love and affection are presumed. (Ala.) *Western Union Tel. Co. v. Ayers*, 92.

TENANCY IN COMMON.

COTENANCY—Adverse Possession.—A cotenant cannot hold adverse possession as against his cotenants in the common property. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

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TIME.

1. **TIME.**—Fractions of a Day are not Usually Regarded, in judicial proceedings, but such proceedings take effect in law from the earliest period of the day upon which they originated and came into force. (Ala.) *Ex parte Massie*, 20.

2. **TIME.**—The Unity of a Day and Its Indivisibility as a period of time is a fiction of the law, and is regarded only in promotion of the ends of justice, and never when justice and right will thereby be defeated. (Ala.) *Ex parte Massie*, 20.

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TRIAL.

1. **JURY TRIAL**—Evidence in Civil Cases.—Belief of a fact by the jury to its reasonable satisfaction is all that is necessary in a civil case; it need not be induced to such belief "by a preponderance of the evidence." (Ala.) *Arndt v. City of Cullman*, 922.

2. **VERDICT AGAINST EVIDENCE**.—A verdict of a jury on matters of fact cannot be made the basis of a judgment if there is no evidence to support it, or when inferences are made contrary to all reason and logic. (Me.) *Day v. Boston etc. R. R.*, 335.

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TROVER AND CONVERSION.

TROVER—Election to Take Money Verdict.—The sole issue in trover is the title to the property in dispute, and this is not affected by the fact that plaintiff elects to take a money verdict in lieu of the specific personalty claimed. (Ga.) *Berry v. Jackson*, 102.

TRUSTS.

1. **TRUSTS**—Equity—Parties.—In a Suit to Enforce the Rights of Beneficiaries in a trust deed, the husband of a deceased beneficiary need not be joined individually as a party plaintiff, where he is joined as the administrator of his wife's estate, and also sues as the next friend of her son. (Ala.) *Gulf Red Cedar Lumber Co. v. O'Neal*, 22.

2. **TRUSTS**—Parties.—In a Suit by Beneficiaries and Grantees Under a Trust Deed which reserves a power of sale in the grantor to enforce their rights against subsequent purchasers of the property, the administrator of the deceased grantor is not a necessary defendant. (Ala.) *Gulf Red Cedar Lumber Co. v. O'Neal*, 22.

3. **WHEN A TRUSTEE IS CLOTHED WITH POWER to Sell Real Estate**, a sale by him is valid and conveys the legal title. (Ala.) *Gulf Red Cedar Lumber Co. v. O'Neal*, 22.

TRUSTS AND COMBINATIONS.

See Monopolies.

VENDOR AND VENDEE.

1. **PURCHASER WITHOUT NOTICE of Unrecorded Lost Deed**. A bona fide purchaser of land for value without notice, either actual or constructive, of an unrecorded lost deed, acquires title as against such deed and those claiming thereunder. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

2. **VENDOR AND PURCHASER**—Attorney and Client—Notice of Unrecorded Deed.—A bona fide purchaser of land is not chargeable

with notice of an unrecorded deed thereof by his grantor, by the knowledge of his attorney, who, without the purchaser's knowledge, is also representing the vendor, and is personally interested in the sale and receives the purchase money. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

3. **VENDOR AND PURCHASER—Attorney and Client—Notice of Unrecorded Deed.**—A purchaser of land is not chargeable with notice of an unrecorded deed thereof by his grantor, by the knowledge of his attorney thereof, acquired before he was employed to purchase the land for such grantee, and while he was representing another person. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

4. **VENDOR AND PURCHASER—Cotenancy—Notice of Unrecorded Deed.**—The record of a deed by a person who has a recorded deed to an undivided one-seventh interest in a whole of the land conveyed, and an unrecorded and lost deed to five of the remaining six-sevenths, is not constructive notice to a bona fide purchaser for value from the record owners of such remaining six-sevenths, that the first-mentioned grantor claimed to have owned six-sevenths instead of one-seventh of the land. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

5. **VENDOR AND PURCHASER—Notice of Unrecorded Deed.**—A bona fide purchaser of an undivided interest in land from a grantor in possession thereof, under a complete recorded chain of title thereto, is not chargeable with notice of an unrecorded and lost deed thereto, when neither the grantee therein nor those claiming under him had been in actual, open, notorious, and exclusive possession of the land for several years prior to such purchase. (Ala.) *Scotch Lumber Co. v. Sage*, 932.

6. **RENTS.**—Purchaser of Land in Possession, who purchased under a defective power, can be made to account as trustee only for the rents and profits received, and not for the rental value of the land. (S. C.) *Hunter v. Hunter*, 663.

VERDICT.

See Criminal Law, 3; Trial.

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WAREHOUSEMEN.

1. **WAREHOUSEMAN—Receipts—Storage Charges.**—The holder of a warehouse receipt is entitled to delivery of the property stored upon tender of payment of storage charges upon the property, and payment of charges on other property of the owner cannot be required before delivery of that for which the charges have been tendered in due form. (La.) Marks v. New Orleans Cold Storage Co., 285.
2. **COLD STORAGE.**—Charges for cold storage cannot be compensated by the storer's unliquidated claim for damages. (La.) Marks v. New Orleans Cold Storage Co., 285.
3. **COLD STORAGE Charges on Damaged Goods** for which the storer is made to pay may be recovered by him. (La.) Marks v. New Orleans Cold Storage Co., 285.
4. **COLD STORAGE COMPANIES Have a Right to Hold Possession** of goods stored until the storage charges are paid. (La.) Marks v. New Orleans Cold Storage Co., 285.
5. **COLD STORAGE COMPANIES—Liability.**—It is not necessary, in order to recover for damage to goods in cold storage, to prove more than that the goods when delivered to the company storing them were, according to the usual and ordinary test of commerce sound. (La.) Marks v. New Orleans Cold Storage Co., 285.
6. **COLD STORAGE—Limitation of Liability.**—A cold storage company may, by contract, limit its liability, and a person who signs such contract will be bound by its terms, but the waiver must be express and to the full extent intended. (La.) Marks v. New Orleans Cold Storage Co., 285.
7. **COLD STORAGE—Limitation of Liability.**—Although a cold storage receipt issued for goods received contains a printed limited liability clause, to the effect that the storer will not be liable for the "contents or damage to goods," he is not thereby relieved of his obligation to preserve the goods in the condition in which they were when received. (La.) Marks v. New Orleans Cold Storage Co., 285.

See Cold Storage.

WARRANTS.

See Counties; Municipal Corporations, 16.

WATERS AND WATERCOURSES.

1. **WATER RIGHTS—Nature of Action to Determine.**—An action to quiet the title and establish the right to water for irrigation is in the nature of an action to quiet title to real estate. (Utah) Conant v. Deep Creek etc. Irr. Co., 721.
2. **WATER RIGHTS—Jurisdiction when Stream in Two States.**—Where a stream rises in Idaho and flows into Utah, an Idaho court has no jurisdiction to determine the title and right to the water

flowing in Utah and there diverted and used for irrigation. (Utah) *Conant v. Deep Creek etc. Irr. Co.*, 721.

3. **WATERS.**—A Lower Riparian Proprietor is Entitled to the natural flow of a stream, subject to the lawful use of the water by upper proprietors. (Ohio St.) *City of Canton v. Shock*, 557.

4. **WATERS.**—A Riparian Owner has the Right to the Use of a stream for any legal purpose, provided he returns it uncorrupted and without essential diminution. (Ohio St.) *City of Canton v. Shock*, 557.

5. **WATERS OF STREAM—Use by City.**—As an upper riparian proprietor, a city has the right to use from a stream all the water it needs for its own purposes though it receives pay therefor; but it has no right materially to diminish the flow, to the injury of a lower proprietor, by transporting water away from the city, or by supplying it to outsiders, or unreasonably to its own inhabitants for power purposes. (Ohio St.) *City of Canton v. Shock*, 557.

6. **WATERS.**—The Primary Use of Waters is for Domestic purposes and its secondary use for the purposes of power. (Ohio St.) *City of Canton v. Shock*, 557.

7. **WATERS OF STREAM—Use for Power.**—When there is not Sufficient water in a stream fully to supply all proprietors, for power, each should use it reasonably with as little injury to the others as circumstance permit. (Ohio St.) *City of Canton v. Shock*, 557.

8. **RIPARIAN PROPRIETOR.**—A Municipal Corporation situated on a stream is a riparian proprietor with the rights and liabilities incident to such proprietorship. (Ohio St.) *City of Canton v. Shock*, 557.

9. **WATERS—Compensation for.**—The Water Taken by a City from a stream for its use is by virtue of its rights as a riparian owner, and not by right of eminent domain. Hence, no compensation need be made therefor. (Ohio St.) *City of Canton v. Shock*, 557.

10. **WATERS.**—A Settler is not Confined to an Appropriation of water simply for the amount of land irrigated during the first year of its diversion. (Utah) *Elliot v. Whitmore*, 700.

11. **WATERS.**—The Extent of an Appropriation of Water is determined by the reasonable necessity for its use, the intention of the appropriator followed by reasonable diligence in executing such intent, and the purpose of the appropriation. (Utah) *Elliot v. Whitmore*, 700.

12. **WATERCOURSES—Construction of Boom Statute.**—A statute relating to booms and dams, and providing that nothing therein shall be construed as depriving mill owners and other riparian proprietors from recovering damages from a corporation maintaining a boom or dam, creates no new right in mill owners, but only places the existing constitutional and common-law rights of such owners beyond judicial construction to the contrary. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

13. **WATERCOURSES—Erection of Logging Boom—Nuisance—Damages.**—The erection of a logging boom in a navigable or floatable stream in such close proximity to a mill thereon as to impede the flow of the water and cause a deposit of sand and sediment immediately below the mill dam, thereby destroying, in an appreciable degree, the water power of such dam, creates a nuisance, and renders the boom owner liable to the mill owner for the damages caused thereby. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

14. WATERCOURSES—Logging Boom—Nuisance.—Measure of Damages for the interruption of the natural flow of a navigable stream by the erection of a logging boom, constituting a nuisance, and preventing the running of a mill, is what the mill would have been worth during such deprivation of its use, if such deprivation had not taken place, and this is the rental or profitable value of the mill. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

15. WATERCOURSES—Right to Erect and Maintain Log Booms. If a logging boom in a navigable or floatable stream is not negligently, unlawfully, or improperly erected or managed, there is no liability for any damage caused thereby to others using the stream for milling or other purposes. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

16. WATERCOURSES—Right to Use for Logging Purposes.—A navigable or floatable stream may be used both for milling and log purposes, in a reasonable manner, although such uses may mutually interfere with and injure each other. The erection of a boom in a proper manner to catch and hold logs is a lawful use of the stream, and does not render its owner liable to a mill or other riparian owner thereon for unavoidable damage caused by the use of the stream for such logging purposes. (W. Va.) *Pickens v. Coal River Boom etc. Co.*, 819.

See Navigable Waters.

WILLS.

1. WILLS—Devise of Realty.—There must appear from the words used by a testator a clear intent to devise his real estate, otherwise the heir at law will not be disinherited. (N. J. Eq.) *Miller v. Worrall*, 480.

2. WILLS.—If There be Uncertainty as to the Intent of a Testator to devise real estate in his last will, it will not be construed to do so. (N. J. Eq.) *Miller v. Worrall*, 480.

3. WILLS—Devise of Property.—Where the Words "Personal and Mixed" follow a devise of "all the rest and residue of my property," such words qualify and define the kind of property intended to be disposed of, and do not include a devise of real estate. (N. J. Eq.) *Miller v. Worrall*, 480.

4. WILLS.—Extrinsic Evidence is Admissible to Show a Testator's Intention, where the person or thing, the object or subject of a gift, is described in terms which are applicable indifferently to more than one person or thing. (Mo.) *Willard v. Darrah*, 468.

5. WILLS—Extrinsic Evidence.—Where the description of a person or thing in a will is partly correct and partly incorrect, and the correct part leaves something equivocal, extrinsic evidence is admissible to show the testator's intention. (Mo.) *Willard v. Darrah*, 468.

6. WILLS.—Indirect Parol Evidence is always admissible to identify the objects of a testator's bounty. (Mo.) *Willard v. Darrah*, 468.

7. WILLS.—Parol Evidence is Admissible to Solve a Latent Ambiguity produced by extrinsic evidence in the application of the terms of a will to the objects of a testator's bounty. (Mo.) *Willard v. Darrah*, 468.

8. WILLS—Parol Evidence.—Where There are Two Sets of Brothers of the same name, each having equal legal claims upon the

testator's bounty, extrinsic parol evidence is admissible to determine which of the two sets he meant. (Mo.) Willard v. Darrah, 468.

9. **WILLS.—Presumption of Intention.**—Where a testator executes his will in due form, apparently disposing of all his property, the law presumes that it was his intention to dispose of his whole estate, and not to die intestate as to some of his descendants. (Mo.) Willard v. Darrah, 468.

10. **WILLS.—The Intention of a Testator** is to be collected from all the parts of a will, and it must be clear, or else the heir at law will not be disinherited. (N. J. Eq.) Miller v. Worrall, 480.

11. **WILLS.—The Testimony of the Scrivener of a Will**, who by mistake wrote the word "nephews" instead of "grandchildren," is admissible to show the testator's real intention, where the description in the will is partly correct and partly incorrect. (Mo.) Willard v. Darrah, 468.

12. **WILLS.—The Word "Nephew"** does not include grandnephew. (Mo.) Willard v. Darrah, 468.

13. **WILLS.—The Words "Personal and Mixed"** in a will cannot be extended so as to devise real estate. (N. J. Eq.) Miller v. Worrall, 480.

14. **WILLS.—Where a Testator Uses Technical Words** in a will, they are to be given a technical meaning. (N. J. Eq.) Miller v. Worrall, 480.

15. **WILLS.—Revocation.**—Notwithstanding the intention of the testator, he cannot revoke his will except by writing signed and attested in the manner provided for the execution of the will itself. (Ga.) Howard v. Hunter, 121.

16. **WILLS.—Revocation by Cancellation.**—Notwithstanding the intention of the testator, he cannot revoke his will by cancellation, except by obliterating or canceling some material part thereof. (Ga.) Howard v. Hunter, 121.

17. **AN UNATTESTED INDORSEMENT** on the back of a will in the testator's handwriting, that "This will is made void by one of more recent date," does not constitute a revocation of the will so indorsed. (Ga.) Howard v. Hunter, 121.

Wills, revocation by indorsements in the testator's handwriting, 125.

WITNESSES.

1. **WITNESSES.—Declarations of Decedents.**—In a contest to determine the validity of a wife's mortgage on the estate of her deceased husband, the wife cannot testify as to any transaction with or statements by him, since her interest is antagonistic to his estate. (N. J. Eq.) Adoue v. Spencer, 484.

2. **EVIDENCE.**—Witnesses interested in the matter in suit are competent, and their testimony is binding on the court, unless overcome by counter-testimony, or irreconcilable with the known facts. (La.) Marks v. New Orleans Cold Storage Co., 285.

See Evidence.

WORDS AND PHRASES.

See Definitions.

WRONGFUL DEATH.

See Death.

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